TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 195.

FREDERICK J. LOWREY, GEORGE P. CASTLE, AND WILLIAM O. SMITH, TRUSTEES, APPELLANTS,

vs.

THE TERRITORY OF HAWAII.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED FEBRUARY 1, 1906.

(20,075.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 10, 1906.

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1 In the Supreme Court of the Territory of Hawaii.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees, Petitioners,
v.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Amended Petition.

To the Honorable the Supreme Court of the Territory of Hawaii:

Your petitioners, Frederick J. Lowrey, George P. Castle and William O. Smith, respectfully represent that they have a claim against the Territory of Hawaii; that said claim is founded upon the statutes of this Territory hereinafter referred to and also upon the contract with the said Territory hereinafter described, and the particulars of said claim your petitioners set forth as follows:

I.

The American Board of Commissioners for Foreign Missions, hereinafter referred to as the A. B. C. F. M., for many years prior to 1850 had conducted and maintained a Protestant Mission in the Hawaiian Islands, hereinafter referred to as the Mission, and as an essential part of its missionary work carried on many schools. But its most notable educational work in said connection was centered in a school at Lahainaluna, on the Island of Maui, where
2 it possessed a large tract of land on which it had expended many thousand of dollars in the erection of buildings and other improvements, which school had at said date become a most important factor in the life and progress of the Hawaiian people, and was then the recognized leading educational institution in the Kingdom.

The course of instruction comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrines represented by the Mission.

See Exhibit "AA" being parts of the Laws of the School at Lahainaluna, as Amended and Adopted by the Mission, June 1835.

II.

The facts in regard to the title to said Lahainaluna are as follows: In 1835, the A. B. C. F. M., having established a school at the locality about 1831, the premises occupied by it were set off by the chiefs to the Mission for its purposes, whereupon important improvements were made and the school became permanent. These facts were well established before the Board of Commissioners to

quiet land titles by the evidence of Hon. William Richards, David Malo and others.

Upon the establishment of the said Board of Commissioners to quiet land titles, the claim of the A. B. C. F. M. to Lahainaluna as an established part of its system was duly presented and recognized and became "Part 5, Section 2, Lahainaluna" of claim 387.

See Vol. 2, Foreign Register, pp. (9), 12 and 26.

The evidence on which the claim was established appears in full in——

Vol. 2 of Native Testimony, p. 220.

Upon the adjudication of the claims set forth in No. 287, appears the following:

"Lahainaluna, Part 5, Section 2, claim relinquished before the Land Commission in consequence of an after-arrangement
3 having been entered into with the Hawaiian Government by the Mission." Vol. 3. L. C. Award p. 143, *et seq.*, upon the final confirmation which was duly made to the said A. B. C. F. M., all the lands claimed were awarded "with the exception of Section 2, Lahainaluna, which had been withdrawn." (Do. p. 181.)

Thus the title of the A. B. C. F. M., to the premises, and its right to an award, was clearly recognized.

III.

The "after arrangement" referred to in the records of the Land Commission was briefly as follows:

Because of financial stress and also feeling that the school which had really become a national institution, should be conducted by the Government at its own expense, in April, 1849, the Mission at its general meeting held at Honolulu, voted as follows: "To make over this seminary to the Goverment; it being understood that it is to be conducted on the same principles as heretofore."

See Minutes of the General Meeting of the Sandwich Islands Mission, held at Honolulu, April and May, 1849.

An offer was thereupon made to the Government in pursuance to this vote of the Mission to make over the school to the Government on condition that it should "be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, a summary of which will be found in the Confession of Faith herewith enclosed, and that in case of the Non-fulfillment or violation of the conditions, upon which this transfer is made, by the said Government, the whole property hereby transferred, hereinbefore specified, together with any additions of improvements—should revert to the said Mission.

4 See Exhibits A and A-1.

This offer as made was not accepted by the Government, but it instead submitted a counter offer to the Mission by which it offered to take over the school on the conditions made in the Mission's

original offer, but "provided that in case of the non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the Island, or pay the sum of $15,000. to said Mission, in behalf of the Mission Board in Boston."

See Exhibits B, C, D and E.

Evidently feeling that the "Confession of Faith (Exhibit A-1) was rather loosely drawn, the Mission offered to substitute a more definite form which was accepted by the Government.

See Exhibits F. F-1 and G.

It was necessary in order that this whole arrangement should have full force, that it should be ratified, both by the Hawaiian Legislature and the Prudential Committee of the A. B. C. F. M. This was done by the passage of the act of the Legislature of July 11, 1850.

See Laws of 1850, (F. C. 1850) p. 157, sec. 1, or Civil Code, (1859) Sec. 738,

And the adoption of a resolution by the said Prudential Committee.

See Exhibit H.

IV.

The Hawaiian Government at once took possession of the Lahainaluna Seminary and carried on the school exactly as it had been conducted by the Mission, both in religious instruction and the inculcation of sound literature and solid science.

For many years after the Government had taken over the school the principals of the school continued their relations as missionaries of the A. B. C. F. M., in their work in the school and continued to make reports of their educational and religious work and instruction in the school to the general meetings of the Mission.

See Exhibit "II" and see annual reports of general meetings of the Mission.

In 1862 the seminary buildings were burned down and there was a fear that the Government would not rebuild and continue the school, but the reply came from Honolulu "Lahainaluna must be rebuilt," and it was done at once by the Board of Education.

The principal, in his report for that year, 1862-3 reviewing the history of the school, says: "The Hawaiian Government has always been a liberal friend and benefactor * * * Never in any way have they interfered with our manner of instruction, or in the course

of instruction pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who under the religious instruction at the school became ministers, he says: "While 6 who were connected with it since it has been under the care of the Hawaiian Government have been ordained to the same office."

Prior to the establishment of the Anglican Church in Hawaii, the Board of Education appointed as instructors such persons as were acceptable to the Mission, generally selecting those nominated
6 by the Mission. When the Anglican Mission was established it was proposed that the forms, and probably the substance of religious instruction in public schools, should be changed, and advice was asked of the Attorney General. Hon. Charles C. Harris in reply to the request reviews the whole arrangement, and discussing the "Confession of Faith" says: "It follows that any who teach these doctrines enumerated in the said Confession, and the remainder of whose teachings do not work adversely to those enumerated in the said "Confession," may teach in, or even direct the school." He then refers to the substitution of the Second Confession, saying that it is a much stronger instrument, and proceeds,—"and therefore if any sect of Christians teach the doctrines of each and all of those articles, they may hold the control of the school—they must * * * hold all of these points. Should the Government not be willing to keep the conditions as far as I have shown, then the property and improvements must be restored to the A. B. C. F. M.

Extract from letter of Attorney General Harris to President Board of Education, Oct. 29, 1864.

It was feared that an attempt would be made to establish a state religion and church, and comment was sharp and zealous on all acts of the Government, especially in the matters of education. The "Hawaiian Gazette" was at that time the official mouth-piece of the Government and, discussing the public schools, in the issue of June 3, 1865, there appears an editorial which contains the following:

"The Government has very properly decided that its support shall be given to schools irrespective of religious teaching, and in the native common schools it is absolutely forbidden as it has been thought more suitable that this necessary branch of education should be left to the parent and ministers of religion. At the same time
7 there is one instance in which some of our readers may imagine that the board is chargeable with partiality or supporting a state church, inasmuch as it pays a large annual sum to defray the expenses of the Seminary of Lahainaluna where the principles and theology of one particular sect are exclusively taught, although opposed to the belief of all in communion with the Roman Catholic and Episcopal Churches."

The same number of that organ contains the "Rules and Instructions to School Agents and Teachers of Government Schols," in which, Article I, "Religious instruction is strictly forbidden," thus emphasizing the difference at Lahainaluna where "the principles and theology of one sect are exclusively taught."

The following year, upon the suggestion by the Mission of certain

names as instructors, correspondence arose upon the right of the Mission to nominate. While absolutely denying the existence of such right, the Board of Education says: "It is understood that the institution is to be continued so as to aid, instead of defeating the purpose for which it was founded, and there has nothing been done to justify the intimation that the Board have any desire to defeat such purpose, or to introduce any doctrine, practice or influence antagonistic to the faith, practice and forms of worship of the founders," and definitely admitted "that a full compliance with the agreement consists in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian Churches of the United States."

Regarding the rights of the Mission, the Board of Education further says: "The Board are fully aware that if they do not see fit to carry on the institution according to the terms of the contract, they have to reconvey it, or to pay the sum of $15,000."

Extract from letter, Board of Education to S. N. Castle, June 30, 1865.

8 After 1865 Lahainaluna Seminary continued to be conducted on the same lines as prior thereto. But during the session of the Legislature of 1884 the argument was used in favor of an appropriation for St. Louis College that the Government was maintaining a sectarian school at Lahainaluna. In 1888 the argument was repeated in favor of the act to set off certain premises for the Roman Catholic Church, and its truth was admitted in both cases.

V.

In 1894 the Constitution of the Republic of Hawaii was promulgated. Article 98 thereof provides that * * * "No public money shall be appropriated * * * for the support of benefit of any sectarian, denominational or private school." This provision is continued and remains in full force as a part of Section 55 of the Organic Act.

Religious instruction upon the lines formerly pursued by the Mission, and subsequently by the Government in accordance with the agreement, was continued up to on or about September 1st, 1903, but ceased to be a part of the curriculum at Lahainaluna on or about said first day of September, 1903, and religious tenents and doctrines in accordance with the creed and articles of faith of the Mission then ceased to be taught and are no longer taught.

The "cultivation of sound literature and solid science" has also ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

See Report of Governor of Hawaii for 1904, p. 32;

See Exhibit I;

See extract from report of the Superintendent of Public Institutions to Governor of Hawaii, included in the above report for 1904 above referred to on page 35.

9 That the territory maintains no other institution of like character and on similar principles in any other places on these Islands.

VI.

That all the rights, property and interest of the American Board of Commissioners for Foreign Missions to any property in the Territory of Hawaii and any claim or demand whatsoever with reference thereto was by deed, duly executed and delivered, conveyed to Henry Waterhouse, since deceased, and your petitioners, Frederick J. Lowrey and William O. Smith by deed of trust, dated July 25, 1903, and recorded in the office of the Registrar of Conveyances in Honolulu, Island of Oahu, Territory of Hawaii, in Liber 254, pages 91 to 101.

That by the provisions of said trust deed in case of the decease of any of the trustees, the said American Board of Commissioners for Foreign Missions could appoint by certificate in writing duly acknowledged and authenticated and recorded in the office of the Registrar of Conveyances in Honolulu, a successor who upon said appointment should be vested with all the rights of said deceased Trustee and subject to the same obligations and duties. That said Henry Waterhouse has died since the execution and delivery of said trust deed and in accordance with said provision your petitioner, George P. Castle, was duly appointed as Trustee by said A. B. C. F. M., by certificate in writing duly recorded in said Registry.

That the right to recover, hold and manage any of the said properties or interests or rights, or any rights or interests arising therefrom or with reference thereto, so conveyed by the said trust deed, are now vested in your petitioners.

10 *Claim.*

Upon the foregoing facts, petitioners claim that the A. B. C. F. M., in April, 1849, was the owner of the land and improvements thereon occupied by the school or seminary at Lahainaluna; that at that time, in pursuance to an agreement between the said A. B. C. F. M. and the Hawaiian Government, as subsequently ratified by the said A. B. C. F. M. in August, 1849, and by the Hawaiian Legislature in July, 1850, the said A. B. C. F. M. transferred the said Lahainaluna School or Seminary and property to the said Government, in consideration of the agreement of the said Government to continue in the said school the teaching of the religious tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the Mission, as summarized in a Confession of Faith submitted by the said Mission, not to teach or allow to be taught in the said school any religious tenet or doctrine contrary to those so inculcated by the said A. B. C. F. M. through the said Mission, and further to continue the said school at its expense as an institution for the cultivation of sound literature and solid science; and in case of the non-fulfillment or violation of any of the said conditions, the whole property so transferred, together with any additions or improvements which may have been made upon the premises, and all the rights and privileges so transferred, to revert to the said A. B. C. F. M. or the said Government to pay the sum of Fifteen Thousand (15,000) Dollars to the said A. B. C. F. M. at the option of the said Government; that

First: Said Government on or about the first day of September,

1903, ceased to continue the teaching of the said religious tenets and doctrines theretofore inculcated by the A. B. C. F. M. through the said Mission, contrary to its agreement; and therefore the
11 said Government must now either return the property, together with all improvements, or pay over the sum of Fifteen Thousand (15,000) Dollars, according to the tenor of its agreement;

Second: That on or about July 1, 1904, the said Government ceased to continue the said school as an institution for the cultivation of sound literature and solid science, contrary to its said agreement, and therefore the said Government must now either return the property together with all improvements or pay over the sum of Fifteen Thousand (15,000) Dollars, according to the tenor of its agreement.

That on or about the first day of September, 1904, your petitioners presented the foregoing claim to the Department of Public Instruction and to the Governor of the Territory of Hawaii and demanded that the Territory should reconvey the premises and property herein described or pay to them the sum of said Fifteen Thousand (15,000) Dollars, at the election of said Territory; and that the said Department of Public Instruction and the said Governor refused to either reconvey said premises and property or to pay the said sum of Fifteen Thousand (15,000) Dollars, and that the said Territory has elected to retain said premises and that election is evidenced by said refusal and by the further fact that it is proceeding to erect expensive and extensive buildings on said site and is proceeding to expend large sums of money in fitting said premises and said school to become a technical school, namely an agricultural school.

That your petitioners are the owners of said claim against the Territory of Hawaii; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, and that said claimants are justly entitled to the amount herein claimed, namely, the sum of Fifteen Thousand (15,000) Dollars, after allowing all just credits and offsets; that your petitioners and said
12 Henry Waterhouse and said American Board of Commissioners for Foreign Missions have and each of them has at all times borne allegiance to this Government and have not in any way voluntarily aided or abetted or given encouragement to rebellion against this Government and that they believe the facts as stated in this petition to be true.

Wherefore your petitioners pray that this Court shall hear and determine the facts in reference to said claim and may adjudge that your petitioners are entitled to judgment against the Territory of Hawaii in the sum of Fifteen Thousand (15,000) Dollars, and shall cause notice of the institution of this Petition to and these proceedings against the said Territory to be given to the said Territory and set a time for the hearing of the same.

(Sg.) F. J. LOWREY.
(Sg.) WILLIAM O. SMITH.
(Sg.) GEORGE P. CASTLE.

(Sg.) CASTLE & WITHINGTON,
(Sg.) SMITH & LEWIS,
Attorneys for Petitioners.

TERRITORY OF HAWAII, *Island of Oahu, Honolulu, ss:*

Frederick J. Lowrey, William O. Smith and George P. Castle, being duly sworn each for himself, deposes and says: that he is one of the petitioners above named, that he has read the fore-
13 going petition and that he believes the facts therein stated to be true.

(Sg.) F. J. LOWREY.
(Sg.) WILLIAM O. SMITH.
(Sg.) GEORGE P. CASTLE.

Subscribed and sworn to before me this 6th day of December, 1905.

T. M. HARRISON, [SEAL.]
Notary Public.

EXHIBIT AA.

Laws of the High School, as Amended and Adopted by the Mission June, 1835.

CHAPTER I.

Design of the School.

The design of the High School is,

1. To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus Christ, with all its accompanying blessings, civil, literary and religious.

4. Another object still more definite and of equal or greater importance, is, to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellow men.

CHAPTER VII.

Of the Studies of the School.

4. The whole school shall meet between daylight and sun-
14 rise each week day for prayer, at which one of the Instructors shall preside; the roll shall be called, absentees marked and called to an account at least once a week.

6. On the afternoons of Tuesdays and Thursdays each week, or at other times equivalent, the whole school shall meet for biblical instruction, embracing the interpretation of Scripture, evidence of Christianity, Archeology and Sacred Geography. And Friday afternoon of each week or time equivalent shall be spent in exhibiting and correcting compositions in the Hawaiian language and in elocution.

EXHIBIT A.

HONOLULU, *April* 25, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of the Hawaiian Islands.

SIR: The undersigned, a committee of the general meeting of the Mission of the A. B. C. F. M., at the Sandwich Islands, appointed in reference to the Mission Seminary at Lahainaluna, Maui, beg leave through your Excellency to offer a few remarks respecting that institution, and make some proposals in reference to it to His Majesty's Government for its consideration.

It is well known to His Majesty and also to most of the members of His Government that in the year 1831, the Mission commenced the establishment of the institution now known as the Mission Seminary of Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the Islands.

From that period to the present time, this institution has been unceasingly and anxiously watched over, cherished and cared for by the Mission. No expense or pains coming within its appropriate means or power have been spared to promote its usefulness and secure the objects of its establishment.

Three missionaries have for a large portion of the time been devoted to its interests, and two at all times since the two or three first years of its existence. About $77,000.00 have been expended for its benefit, including the support of the teachers and the dwellings erected for their accommodation.

We need not point you to the fruits of this cherished institution, scattered throughout the Islands, filling various ports of honor, responsibility and usefulness, both in and out of the Government. They are well known to His Majesty, and the officers of His Government, and to none better than yourself.

This institution has been planted and sustained to the present time by the American Board of Commissioners of Foreign Missions, from donations given by the American churches for the spread of the gospel in heathen lands. That Board, as we learn by recent intelligence, was at the close of its last financial year embarrassed by a debt of $60,000.00 incurred in the prosecution of its labors of benevolence and mercy.

As a consequence of its indebtedness, it has been obliged to curtail its expenditures by diminishing its grants to each one of the Missions under its care, and this Mission in common with others has shared in the general reduction.

For this reason the Mission will be unable to carry forward its operations with the rigor to be desired in all of it departments of labor. Some must almost inevitably suffer for want of pecuniary means.

In view of these facts, and believing that under present circumstances the transfer of this institution to the fostering care and patronage of Government will promote the highest interests of the

Hawaiian people, we beg leave through your Excellency to
16 submit to His Majesty's Government for its consideration
the following proposals, viz:

That the Mission of the A. B. C. F. M. at the Sandwich Islands, acting for and in behalf of the said American Board of Commissioners of Foreign Missions, having its headquarters in Boston, State of Massachusetts, in the United States of America, relinquish all of their right, title and interest to and in the Seminary buildings located at Lahainaluna on the Island of Maui, and known as the Mission Seminary, together with all of the dwelling houses at that station erected by the Mission at the expense of the said A. B. C. F. M., for the use of the teachers in the said Mission Seminary; also the building erected by the Mission as a printing office and bindery, also all lands pertaining to and granted for the use of the Missionary Seminary, and also all philosophical and other apparatus procured for the use of the said Seminary, also the public library of the said institution, and to transfer the same to the Hawaiian Government for its use, benefit and behoof to have and to hold the same forever.

Providing, however, and this transfer is made upon the express condition that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid science; and further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the nonfulfillment or violation of the conditions upon which this transfer is made by the said Government, the whole property hereby transferred, hereinbefore specified, together with any additions or
17 improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government, by the said Island Mission, shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board Commissioners of Foreign Missions.

These proposals, if accepted, by the Hawaiian Government shall not have binding force until they shall have received the sanction of the Prudential Committee of the American Board Commissioners of Foreign Missions in Boston; and further should the said Hawaiian Government accept the proposals here presented, and enter forthwith upon the fulfillment of the conditions, and should the said transfer not meet the approbation of the Prudential Committee, the Mission on its part, pledges itself to refund to the said Government any necessary expenses it may have incurred in carrying on the institution whilst the parties were awaiting the ratification or rejection of this transfer by the said Prudential Committee. Provided, however, that moneys shall not have been expended in enlargement or improvements, other than what may have been actually necessary to keep the buildings in repair and carry on the institution.

In case of disagreement of the parties as to the amount proper to

be refunded, in case of the non-ratification of this conveyance by the Prudential Committee, the sum shall be determined by two arbitrators one of which shall be chosen by each of the respective parties, and which arbitrators in case of disagreement shall elect a third to decide upon the award.

The foregoing remarks and proposals are respectfully submitted for the consideration of His Majesty's Government, and I — feel greatly obliged by an early answer.

18 We have the honor to be,

Very respectfully, Your Ex. friends and Most Obedient servants,

W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE, *Com.*,
By S. N. CASTLE.

Confession of Faith.

EXHIBT. A-1.

I believe in Jehovah;—that he exists without beginning, without end, and without change; that though he is not seen with mortal eyes, yet he is every where present and sees all things; that in power and wisdom, and goodness, in all perfections and excellencies he is infinite; that he made the earth and the heavens men and angels, all worlds, and all that is in them; that he upholds, and governs all according to his own pleasure, that he alone is God and that all beside him that are called gods are vanity and the work of errors.

2. I believe in the scriptures of the Old and New Testaments, that they are the word of God, and the sure, and perfect and only rule of holy faith and practice.

3. I believe that man was originally created in the image of God, pure and happy; that he fell by transgression, and that consequently, all mankind of every generation are naturally in a state of corruption, guilt and death.

4. I believe that God in his sovereign mercy, gave early promise of a Savior, and according to his promise, has sent his Son into the world, made of a woman and in the likeness of man.

5. I believe in the Lord Jesus Christ; that he is the Son of God; that he died upon the cross as a propitiation for our sins, and

19 for the sins of the whole world, that there is full redemption in his blood, even the forgiveness of sins, and justifications unto life eternal unto all that believe in his Name; that there is none other name given under heaven among men, whereby we must or can be saved; that he is the King of Zion, has all power in heaven and earth, and will judge the quick and the dead.

6. I believe in the Holy Spirit, the Spirit of God; that it is by him that men are convinced of sin, renewed after the image of God, unto righteousness and true holiness, and fitted to dwell forever in heaven.

7. I believe that in all ages, Jehovah has had a church in the world, in which he has graciously dwelt, and which he designs to

establish in all nations, and to make an eternal excellency; and that it is his will that all who are made partakers of the grace of the gospel should publicly and solemnly join themselves to his church and walk before him in all his statutes and ordinances with a perfect heart.

8. I believe in the resurrection of the body in the judgment of the great day, and in the everlasting happiness of the righteous and the everlasting punishment of the wicked.

Exhibit B.

Passed in Privy Council April 26, 1849.

A communication having been received from the Rev. W. P. Alexander, Rev. C. B. Andrews and S. N. Castle, as a committee of the American Mission of these Islands proposing to transfer the entire property of the Seminary at Lahainaluna, Island of Maui, to the Government of the Hawaiian Islands, to be its property forever, on certain specified conditions, Therefore,

Resolved, I. That the above proposals be accepted, subject to the ratification of the Legislature; provided, that in case of the
20 non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishmen to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the *the* Island, or pay the sum of $15,000. to said Mission, in behalf of the Mission Board of Boston.

Resolved, II. That the sum of $3000. be appropriated from the Royal Treasury for the support of said Institution for one year, commencing on the first day of June next.

Resolved, III. That the Minister of Public Instruction be instructed to secure the services of two competent teachers for said Seminary on such terms as to him may seem equitable and proper.

Resolved, IV. That the Institutions be committed to the Minister of Public Instruction, as in the case of the Royal School; and that it be his duty to make an annual report of the same to the Legislature.

Resolved, V. That all lands belonging to the Government in Kaanapali be appropriated to the use of the said Seminary at Lahainaluna, to be disposed of by the Minister of Public Instruc-
21 tion in consultation with the King's Cabinet with a view to providing as far as possible, an annual income for the support of the Seminary above named.

OFFICE OF PUBLIC INSTRUCTION, *April 27th*, 1849.

EXHIBIT C.

To Rev. Wm. P. Alexander, Rev. C. B. Andrews, S. N. Castle.

GENTLEMEN: I have the honor to acknowledge the receipt of your letter of the 25th inst. proposing on certain conditions, to transfer the Seminary at Lahainaluna to the Government of these Islands; and to inform you that your generous proposal was this day submitted to His Majesty in Privy Council, and the resolutions enclosed were unanimously adopted with reference thereto.

You will please to inform me at your earliest convenience, whether the several conditions specified in these resolutions are acceded to by the Mission; and accept in the meantime the acknowledgements of His Majesty's Government for so valuable an offer.

I am gentlemen, with the highest esteem, your obedient humble servant,

(Sgd.) RICHARD ARMSTRONG,
Minister of Public Instruction.

EXHIBIT D.

HONOLULU, *April 28th*, 1849.

To Ex. R. Armstrong, Minister of Public Instruction, of His Hawaiian Majesty.

22 SIR: Your letter of the 27th inst. with certain Resolutions of His Majesty's Privy Council accompanying, in answer to and based upon certain proposals, made by the undersigned as committee, on behalf of the American Mission, through your Excellency, to His Majesty's Government, respecting the Mission Seminary, on the 25th inst., came to hand last evening.

The said letter and resolutions have been laid before the General Meeting of the Mission, for its action and we are directed to furnish your Excellency, for the use of His Majesty's Government a copy of the preamble and resolutions adopted on the occasion, which we have the honor to transmit herewith.

We remain very truly,
Yours most obedient servants,

(Sgd.) W. P. ALEXANDER,
" C. B. ANDREWS,
" S. N. CASTLE,
Committee.

EXHIBIT E.

Preamble and Resolutions Adopted in General Meeting, April 28th, 1849.

Whereas, a letter has been received by this Mission through Messrs. Alexander, Andrews and Castle, a committee appointed in reference to the Mission Seminary at Lahainaluna, from Mr. Arm-

strong, His Majesty's Minister of Public Instruction, accompanied by a copy of Resolutions passed by his Majesty's Privy Council of the 27th of April last; accepting of certain conditional proposals, in reference to the said Seminary, made by said Committee on behalf of the Mission on the 25th inst., and

Whereas, His Majesty's Government has been pleased to
23 add certain other proposals or conditions to those of said committee, made on behalf of the said Sandwich Islands Mission therefore:

Resolved—1st. That this Mission, assembled in General Meeting, approve of and accept the said additional conditions proposed by His Majesty's Government and that, if further testimonials of conveyance than is found in the correspondence between the said Committee and the said Hawaiian Government, be deemed necessary by the said Government, the Minister of Public Instruction, or such other officer as shall be deemed proper by His Majesty's Government, be requested to make or cause to be made out duplicate copies of the said Instrument of Conveyance, embracing all particulars, which shall be thought necessary, one of the said copies to be delivered to this Mission, to be deposited in its Archives.

Resolved—2nd. That the said Committee be instructed to furnish the Mission of Public Instruction with a copy of this preamble and these resolutions for the use of His Majesty's Government.

EXHIBIT F.

HONOLULU, *May 8th*, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of His Hawaiian Majesty.

SIR: Being instructed by the American Mission, in their General Me-ting lately adjourned, we would, as their Committee, most respectfully present for your consideration the confession of faith within enclosed, as a substitute for the one given with the articles of agreement transferring the Mission Sem'y, at Lahainaluna, to the Hawaiian Government.

The reasons for requesting the substitution are, that the
24 previously presented confession, although according in all its specified doctrines with our belief and with that also of the Churches by whom that institution has been founded and sustained, is yet not so disinctive, as to present a barrier to the introduction there, of other deleterious doctrine not specified in said confession. It will admit also, of teachings of this Mission and of the Churches sustaining it, such as we feel to be entirely subversive of Evangelical Christianity. Not doubting, but that these reasons will commend themselves to the members of His Majesty's Government, we beg leave to express in presenting them the high consideration with which we remain,

Your Ex. Most Sincere Friends and obedient servants,

(Sgd.) W. P. ALEXANDER,
C. B. ANDREWS,
S. N. CASTLE,
Committee.

Confession of Faith.

EXHIBIT F-1.

We Believe,

1. That there is one only living and true God, the Creator, preserver, and Governor of the Universe; a Being Self-existent, independent, and immutable, infinite in power, wisdom, justice, goodness, mercy and truth;

2. That the Scriptures of the Old and New Testaments were given by inspiration of God; that they contain a complete and harmonious system of Divine truth, and are the only perfect rule of Christian faith and practice;

3. That God is revealed in the Scriptures as the Father, the Son and the Holy Ghost, and that these three are one, and in all Divine attribution, equal;

4. That God made all things for himself; that he governs all things according to the council of his own will, and that the principles and administration of his government are holy, just and good;

5. That our first parents were originally holy; that they fell from that state by transgressing the command of God; and that in consequence of their apostacy, all their descendants are without holiness, and alienated from God, until their hearts are renewed by Divine Grace;

6. That Christ, being God manifest in the flesh, has, by his obedience, sufferings, and death made an atonement for sin, on account of which pardon and salvation are offered to all who truly repent and believe in him; and that all who will, may come and take of the water of life freely; but, that such is the aversion of man to these terms of salvation, that all refuse to comply with them, without the special influences of the Holy Spirit;

7. That those who embrace the Gospel, were chosen in Christ before the foundation of the world, that they should be Holy and without blame before him in love; and that they should be saved not by works of righteousness which they have done, but according to the distinguishing mercy of God, through Sanctification of the Spirit, and belief of the truth;

8. That those who cordially embrace Christ will be kept by the mighty power of God through faith unto Salvation;

9. That there will be a general resurrection both of the just and the unjust; and a day of judgment, when all must give account to Christ of all deeds done in the body; when the impenitent will go away into punishment, and the righteous into life, both of which will be without end;

10. That the Lord Jesus Christ has a visible church in the world; that the terms of membership are a credible profession of faith in Christ, and of that holiness which is brought by the renewing grace of God; that none but members of the visible church in regular standing, have a right to partake of the Lord's Supper, and that only they and their households can be admitted to the ordinance of Baptism.

Exhibit G.

Office of Public Instruction.

To Rev. Rev. Wm. P. Alexander Rev. C. B. Andrews, S. N. Castle, Esq.,

Gentlemen: Your letter of May 8th, enclosing a confession of faith which you request may be substituted for the one accompanying your letter of the 25th of April, has been received, and I have only to state that the request is granted, and the substitution made.

It will be desirable, I think, when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot be done until the transaction is ratified by the American Board and the Legislature of the Islands.

Very respectfully, Your humble servant,

R. ARMSTRON-,
Minister of Public Instruction.

Exhibit H.

Honolulu, March 1850.

Dear Sir: On behalf of the Committee acting for the Missions in the interim of the General Meeting, I beg leave for the in-
27 formation of His Majesty's Government to communicate to you the following Resolution passed by the Prudential Committee of the American Board of Commissioners for Foreign Mission on the 21st of August, 1849, viz:

Resolved, that the agreement "entered into by the Sandwich Islands Mission in April last, transferring the Seminary at Lahainaluna, in the Sandwich Islands to the Government of said Islands, on conditions stated in a letter from the Mission to the Minister of Public Instruction, dated, Honolulu, April 25, 1849, and in a letter from the Minister of Public Instruction, dated, April 27th, 1849, be approved by the Prudential Committee and that the Secretary, having charge of the foreign correspondence, give immediate information of this fact to the Mission."

Very respectfully, Your friend and servant,

(S'g'd) SAM'L N. CASTLE.

To His Ex. R. Armstrong, Minister of Public Instruction, of the Hawaiian Government.

EXHIBIT "I I."

Extract from Letter from Rufus Anderson, Secretary of A. B. C. F. M. to Reverend William P. Alexander, Sandwich Islands, Dated Missionary House, Boston, July 27, 1850.

You ask that your release may take effect from June 1, 1849, assigning as a reason, that you have drawn nothing from the funds of the Board since that date, the Hawaiian Government having paid your salary during the year as teacher of the Seminary at Lahainaluna; and that, by fixing this date for your release, the Mission will be saved from the trouble of settling any questions relative to the *avails* of a few surveying excursions you made during the
28 year. It seems to the Committee, as at present advised, that the fact of your salary's being paid by the Hawaiian Government does not itself at all affect your relation to the Board and to the Mission. While connected with the Board, you of course sustain a full connection with the Mission as such, and instruct in the Seminary as a Missionary of the Board and a member of the Mission. It can make no difference whether your salary be paid by the Hawaiian Government or not, (although we of course expected them, when they took the Seminary to defray all its expenses) or whether it is paid directly to you or into the treasury of the Mission.

EXHIBIT I.

Extract from Report of Superintendent of Public Instruction to Governor of Hawaii, Including in the Report for 1904, *page* 35.

At the beginning of this school year the department of public instruction undertook a complete reorganization of Lahainaluna. Arrangements were made for erecting proper and convenient buildings and an entirely new set of instructors was obtained. The aim of the institution at the present time is to be an agricultural school. A carpenter shop, a blacksmith shop and a modern printing outfit have been supplied. Draft animals have been purchased and a considerable quantity of land has been put into cultivation. But for the delay in erecting the new buildings the institution could have very many more pupils than it supports at present. There is every hope, however, that during the coming year a complete success may be made of the place. A thoroughly revised curriculum will be adopted at the commencement of the year.

Endorsed and filed Dec. 6, 1905. (Sg.) J. A. Thompson, Clerk.

29 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1905, December Session, A. D. 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE, and WILLIAM O. SMITH, Trustees, Petitioners,

vs.

THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Demurrer of Respondent, Territory of Hawaii.

Now comes the Territory of Hawaii, by M. F. Prosser, Esq., Deputy Attorney General of the Territory of Hawaii, and demurs to the amended petition of petitioners heretofore filed herein on the following grounds and for the following reasons:

1.

That this Court has no jurisdiction of the subject matter of the claim as set forth in said petition.

2.

That there is a non-joinder of parties respondent in that the United States of America is a necessary and proper party respondent, the property in said petition described having been, by the Republic of Hawaii, transferred and ceded to the United States of America by the treaty of annexation adopted and approved July 7th, 1898.

3.

That said petition does not state facts sufficient to constitute a cause of action as against this respondent in that:

30 (*a*) It appears by said petition that the purported agreement therein set forth was subject to, and of no effect without, ratification by the legislature of the Kingdom of Hawaii and it nowhere appears in said petition that such agreement as set forth therein was ever ratified by such legislature.

(*b*) That it appears by said petition that petitioners' right of action, if any, accrued more than two years prior to the commencement of this action.

(*c*) That it does not appear by said petition that there has been a breach of any condition upon which the transfer therein set forth to the Kingdom of Hawaii was made.

(*d*) That it affirmatively appears by said petition that the conditions of said purported agreement if broken at all have been broken in compliance with laws and statutes which render the fulfilment of such conditions impossible.

4.

That said petition is indefinite and uncertain in that the allegations therein contained as to breach of conditions as therein pleaded are

conclusions of law, it nowhere appearing in said petition in what respect the conditions therein pleaded have been broken.

Dated Honolulu, December 15th, A. D. 1905.

TERRITORY OF HAWAII,
By M. F. PROSSER,
Deputy Attorney General.

Endorsed and filed Dec. 15, 1905. (Sg.) George Lucas, Clerk.

31 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees,
v.
THE TERRITORY OF HAWAII.

Original.

Argued December 18, 1905; Decided January 3, 1906.

Frear, C. J.; Hartwell and Wilder, JJ.

Territory—action against for its breach of agreement made in 1849, between the Hawaiian Government and American Board.—This court has jurisdiction of an action of assumpsit by the successors of the American Board of Foreign Missions brought upon a breach by the Territory of an agreement made between the board and the Hawaiian government in 1849.

Id.—agreement—construction of—new term not added by acts of parties.—A transfer was made by the American Board to the Hawaiian government of the Lahainaluna school property on condition that "the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission," etc., and that in case of nonfulfilment of the condition the sum of $15,000 should be paid. From the date of the transaction until 1903, religious instruction continued to be taught at the school as previously, both parties appearing to regard such instruction
32 as required by their agreement. Held: the express agreement does not require that the specified instruction should be given, and the terms of the agreement being clear and unambiguous the practical construction which the parties have made does not introduce a new term in the agreement.

The school was changed by the Territory to a technical school under the name of the "Lahainaluna Agricultural School." Held: this is not a breach of the agreement to continue the institution for the cultivation of sound literature and solid science.

33 *Opinion of the Court by Hartwell, J.*

The plaintiffs claim of the defendant the sum of $15,000 for its breach of agreement under the following circumstances:

In 1849, the Hawaiian government, at the suggestion of the American Board of Commissioners for Foreign Missions, took the Lahainaluna school property on the Island of Maui, which consisted of a claim of the board, then withdrawn, for a Land Commission Award for the land used by the school and the school buildings, library and philosophical and other apparatus which were burned in 1862 and replaced by the government. A letter of April 25, 1849, from W. P. Alexander, C. B. Andrews and S. N. Castle, a committee of the Hawaiian Mission representing the board, to Richard Armstrong, Minister of Public Instruction, expressed the condition on which the transfer was made to be as follows: "That the said institution *shall be continued* at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the confession of faith herewith enclosed." A further proviso was expressed in the letter that "in case of nonfulfilment or violation of the conditions" the property should revert to the mission, or, as modified by the government, it might at its option pay the sum of $15,000, and if it should divert the establishment to other purposes than those of education it would "sustain an institution of like character and on similar principles in some other place on the islands, or pay the sum of $15,000."

The plaintiffs contend that the expressed agreement meant not only that the government should not teach nor allow the teaching of any religious doctrine contrary to the specified confession of faith, but that it should require those doctrines to be taught.

34 This contention is based upon the facts averred in the petition that the American Board in 1835 obtained the Lahainaluna premises from the Hawaiian chiefs for a school, the purpose of which was to introduce and perpetuate the Christian religion and to educate young men to become assistant teachers of religion, meaning that they should be educated in accordance with the tenets of the Calvinistic creed which then prevailed at the Andover Theological Seminary; that the school was established in 1831 and until 1849 carried on by the board in strict accordance with its purposes as above expressed, all of which was perfectly understood and appreciated by Richard Armstrong, to whom the letter of the committee was addressed, and by the other members of the Hawaiian government; that from the time of taking the school in 1849 until 1903 the Hawaiian government caused religious instruction to be given at the school as it formerly had been given, thereby showing its understanding that the agreement required this to be done. This understanding on the part of the government was further shown by a letter of October 29, 1864, of Attorney General C. C. Harris to

the board of education advising that only those sects could control the school which taught the doctrines of each and all the articles of the confession of faith and if the government was not willing to keep the conditions the property and improvements must be restored to the American Board; that the following year the board of education declared that "a full compliance with the agreement consists in appointment of persons teaching in the doctrine and after the manner of the Congregational and Presbyterian churches of the United States, and if the board do not see fit to carry on the institution they must reconvey it or pay the sum of $15,000."

It is alleged that religious instruction at the school ceased in September, 1903, when the Territory made the school a technical school named the Lahainaluna Agricultural School. The cessation of religious instruction and of instruction in sound literature and
35 solid science other than is implied in the teaching required at a technical and agricultural school is alleged to be a breach of the original agreement.

The plaintiffs contend that a practical construction has been placed upon the agreement by both parties, which is binding upon the defendant, conforming, as it does, to the objects for which the school was primarily established.

It is too late, they say, after both sides for over fifty years have acted upon the agreement as one which required that the government continue the previous course of religious instruction at the school, for the Territory now to restrict the meaning of the agreement to its precise meaning.

That the unwritten term above mentioned was by the parties themselves read into and made part of the agreement has been urged in the plaintiffs' argument and in their brief with great earnestness and evidently with profound conviction of its truth. In support of their contention they cite numerous decisions and extracts from text writers, including Lord Chancellor Sugden's remark, "Tell me what you have done under a deed and I will tell you what that deed means," which remark, it is said, "has come to be accepted as a maxim in the construction of contracts." Chicago Ry. Co., *v.* N. P. Ry. Co., 101 Fed. 792. This was a case in which the court held that a contract between two railways, requiring one of them to keep and maintain in good order property in their joint use, included the expense incurred for flagmen, station agents, switch tenders and other employees whose services were necessary to the safe and orderly operation of trains running over the joint tracks, and especially as the expense had for ten years been paid by the company on monthly itemized statements, showing how both companies understood the contract and there being "no inconsistency between the terms of the contract and the practice of the parties under it." We have no access to the report of the case in
36 which the Sugden remark is said to have been made, Drummond *v.* Atty. Gen., 3 Dr. & W. 165. It appears from the report of the case on appeal, 2 Ho. Lords Cas., 186, that the court was required to say whether the expression "protestant dissenters," used in a deed of trust, included Unitarians who had for a long time been

treated by the trustees as within the meaning of the trust deed. Much evidence was received consisting in great part of historical documents, extracts from sermons and theological and controversial works published by the trustees, ministers of Dublin congregations, both prior to and after the foundation of the charity. There was further evidence "that the founders and original trustees and their successors for a long time were not merely trinitarian protestant dissenters, but that they had in various ways manifested the utmost abhorrence of unitarians and their doctrine." Lord Chancellor Sugden decreed that unitarians were not entitled to participate in the trust funds and that those of them who were trustees should be removed and others, trinitarians, appointed in their places. The decree was affirmed on appeal, the court saying, "It is clear that the words of themselves have not any such known legal meaning as the appellants would attach to them." Neither of these cases would authorize the admission of evidence to explain the meaning of words having an established, clear and unambiguous meaning. It is only with reference to ambiguaus, uncertain or incomplete terms in a contract that the citations in the plaintiffs' brief apply, namely, that "a construction of a contract, adopted and acted upon by both parties will be regarded as worked into the contract." 1 Wharton, Contracts, Sec. 206.

"In cases where the language used by the parties to the contract is indefinite and ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence." Topliff *v.* Topliff, 122 U. S.
37 121.

"Where the language used by the parties to a contract is of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence." Chicago *v.* Sheldon, 9 Wall. 50.

"The great object and only foundation of all rules of construction is to come at the intention of the parties, and if the words or terms are equivocal, resort may always be had to the circumstances under which the contract was executed, contemporaneous constructions of the parties, as evidenced by their acts, and any subsequent acts showing how the parties understood their contract and what practical construction they put upon it." White *v.* Amsden, 67 Vt. 1.

"If the parties have used words which have an ordinary meaning free from ambiguity, and no technical meaning is shown, extrinsic evidence is inadmissible to show that the parties used such terms in a sense different from their ordinary meaning, as the only effect of such evidence would be to contradict the legal effect of the language which the parties themselves have used." 2 Page, Contracts, Sec. 1111.

"If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight." *Ib.* Sec. 1126.

"Under cover of construction a court cannot reform a written contract to make it express the real intention of the parties, which by mistake is not expressed in the words thereof." *Ib.* Sec. 1130.

Thus it appears from many of the plaintiffs' citations that the rule of construction of contracts is not as broad as they claim.

The terms of agreement are not of doubtful import,—they are as clear as language can express. Why it was that no condition was made which required the government to give religious instruction, why the representatives of the board thought that this condition would be observed although not expressed, and why it appears to have been regarded by the government as an implied condition, becomes evident, we think, upon reflection. No man of New England birth and training was unfamiliar with the general custom prevailing in the public schools of giving at least the amount of religious instruction included in morning prayers and in scriptural readings; no one familiar with this custom as were most, if not all, of the missionaries in Hawaii, would for a moment have doubted that some sort
38 of religious instruction would continue indefinitely to be taught at the Lahainaluna school as well as all other schools. In the thought of the American Board and of the Hawaiian Mission as well it was requisite merely to restrict such instruction to the inculcation of those doctrines in which they believed. Those officers of the Hawaiian government, who, like attorney general Harris, were members of the protestant Episcopal Church, were perfectly aware of the distinctive theological tenets of their own church and of other evangelical churches of America and knew that the teaching at Lahainaluna of their own church doctrines would be to repudiate the agreement with the American Board and would result in a forfeiture of the property transferred to the government by the board unless the sum of $15,000 should be paid in accordance with the agreement; they did not, on their part, contemplate that which has come to pass, namely, that the school might receive no religious instruction upon any theological basis. One may regret that wise and devout Christian men in America, whose practical Christianity was sufficient to enable them in their several ways to accomplish so much for the uplifting of humanity, have found themselves unable to agree upon some form of religious instruction in the schools, but thus far this has not come about.

Whatever the reasons which influenced the Hawaiian government in treating the agreement as it did, its officers had no power to add to or subtract from its clearly expressed terms, nor did they by carefully avoiding the teaching of any doctrines, other than those mentioned in the agreement, thereby admit any obligation of the government to teach any doctrines.

As for the American Board, whether by oversight, or because they thought it unnecessary, or that it was unwise in view of the possibility of exciting antagonism in the legislature or in the cabinet of the King, they did not incorporate in the agreement the require-
39 ment which the plaintiffs say was intended to be agreed upon. This court has no right to take the agreement as meaning anything else than it clearly expresses.

We have preferred, before stating and discussing the defendant's demurrer to the petition, to consider what the agreement was to which the demurrer applied. It follows from holding that there was no agreement for affirmative religious teaching but merely that no

heterodox instruction should be allowed, that no breach of agreement resulted from ceasing to teach the prescribed doctrines. This amounts to sustaining the ground in the defendant's demurrer which claims that the petition sets forth upon the subject no cause of action. The grounds of the demurrer in substance are (1) that this court has no jurisdiction of the claim for damages; (2) that the United States, to whom the land has been ceded upon which the school is established, ought to be made codefendant; (3) that no cause of action is stated, it appearing (*a*) that the agreement was subject to ratification by the legislature and the act of July 11, 1850, relating to the Lahainaluna seminary failing to set forth the terms on which the arrangement was made but merely that one had been made "whereby the seminary of Lahainaluna has been ceded to the King's government on condition that the government undertakes its support," (*b*) that the right of action, if any, accrued upon the annexation in 1898, more than two years prior to the commencement of this action, (*c*) that no breach of any condition is shown, and (*d*) that if the conditions of the agreement were broken this was done in consequence of laws rendering the performance of them impossible; (4) that the petition pleads conclusions of law in its assignment of breach of conditions, not setting forth in what respect the conditions were broken.

The first, second and fourth grounds and divisions *a*, and *b*, of the third ground of the demurrer are not sustained.

40 The question of the impossibility of the performance of the agreement presented by the demurrer relates to the provisions in section 55 of the Organic Act, "nor shall any public money be appropriated for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the government," being in effect the same as the requirement of article 97 of the constitution of 1894, prohibiting public aid to sectarian or private schools. As we have held that there was no agreement to teach certain religious doctrines, the question does not arise of the effect of subsequent legislation and, in view of its importance, ought not to be passed upon *obiter*.

This leaves the question whether the agreement to teach sound literature and solid science was broken by failure to teach those branches of learning otherwise than they would require to be taught in a technical school and school of agriculture. The averment in the petition of the fact that the "cultivation of sound literature and solid science has also ceased" would raise an issue of fact to be tried on evidence were it not modified, and necessarily controlled, by the additional averment that "the institution has become a technical school under the name of the Lahainaluna Agricultural School." By the rule that at common law pleadings are construed, as far as they reasonably may be, against the pleader, the additional averment must be taken to be an admission that the usual technical training is now given at the school in the science of agriculture, so that it becomes a question of law whether such training eliminates, as contended by the plaintiffs, or, on the other hand, includes instruction in sound literature and solid science. An agreement to teach solid science is not violated, but is observed, by teaching applied

science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the littrature relating to the science. We are not prepared to say that such literature, so taught, is not as sound or as valuable as are
41 literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science.

The plaintiffs say that an agricultural school, although scientific in character, "is a school primarily intended to the training of its students in the adaptation of certain selected branches of knowledge to a handicraft or industry; while incidentally the school probably does lead in the in*cluca*tion of some learning and knowledge, it would be knowledge or learning of a special character, the accomplishment of which in itself is not the purpose of the school. The purpose of the school is rather intended for the training of men for an occupation. This negatives the idea that it is an institution for the cultivation of solid science."

Cases are cited which discuss the meaning of literary and scientific institutions, technical schools and schools generally, with reference to exemption of property from taxation, but this case does not demand strict construction of a statute which exempts property from taxation. In consider*a*ing the meaning of the agreement we derive no assistance from definitions of "literature" and "science" or from considering the various purposes of acquiring knowledge for general use or for use in specific work.

The literature taught in American schools fifty years ago did not include the literary courses of the present day; little more was taught which hinted at literature than reading, grammar and composition, the object being to acquire a habit of using the English, and at Lahainaluna the Hawaiian, language correctly. A technical school may or may not, according to its grade, require these studies, but a correct and intelligent use of language is as likely to be acquired in connection with technical studies as when made a separate subject of study. Probably Lahainaluna pupils obtained more proficiency in the use of language by their practical work in printing, which
42 for many years was extensively carried on there, than by theoretical studies.

In no way of looking at the subject which commends itself to our judgment do we regard the agreement as violated by making this a technical school of literature.

The demurrer is sustained.

(Signed) W. F. FREAR.
(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.

D. L. Withington and C. H. Olson, Castle & Withington and Smith & Lewis on the brief, for plaintiffs.

M. F. Prosser, Deputy Attorney General, for the Territory.

(Endorsed:) Supreme Court Territory of Hawaii. F. J. Lowrey *et al.* Trustees *vs.* Territory of Hawaii. Decision. Filed Jan. 3, 1906. George Lucas, Clerk.

43 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
vs.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Judgment.

This cause being heard this day upon the demurrer of the defendant to the plaintiff's amended petition and argued by counsel and the court being fully advised in the premises, is of the opinion and do therefore order that said demurrer be, and the same is hereby sustained.

And thereupon the plaintiff not asking to plead further, it is considered by the Court that the defendant go hence without day.

Dated, Honolulu, H. T. 3rd January 1906.

By the Court.

(Sg.) GEORGE LUCAS, *Clerk.*

Endorsed and filed Jan. 12, 1906 as of January 3, 1906. (Sg.) George Lucas, Clerk.

44 In the Supreme Court of the Territory of Hawaii, October Term, 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
vs.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Bond on Appeal.

Know all men by these presents: That we, Frederick J. Lowrey, George P. Castle and William O. Smith, and W. A. Bowen and Charles M. Cooke, all of the City of Honolulu in the County of Oahu and Territory of Hawaii, are held and firmly bound unto the above named Territory of Hawaii in the sum of five hundred dollars, to be paid to the said Territory of Hawaii, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 17th day of January 1906.

Whereas, the above named Frederick J. Lowrey, George P. Castle and William O. Smith, as Trustees, have prosecuted an appeal to the

Supreme Court of the United States, to reverse the order rendered in the above entitled suit, by the Supreme Court of the Territory of Hawaii.

Now, therefore, the condition of this obligation is such, that if the above named Frederick J. Lowrey, George P. Castle and William O. Smith shall prosecute said appeal to effect and answer all damages and costs, if they shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Sg.)	F. J. LOWREY.	[SEAL.]
(Sg.)	GEORGE P. CASTLE.	[SEAL.]
(Sg.)	WM. A. BOWEN.	[SEAL.]
(Sg.)	CHARLES M. COOKE.	[SEAL.]
(Sg.)	WILLIAM O. SMITH,	[SEAL.]

By His Attorney in Fact, W. J. FORBES.

Approved by
(Sg.) M. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed and filed January 18, 1906 at 10.10 A. M. (Sg.) Henry Smith Clerk Supreme Court.

45 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
TERRITORY OF HAWAII, Appellee.

On Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now come Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, the Appellants in the above entitled action, and say that in the record of the proceedings in the said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That it was error to sustain the demurrer to the petition of the Appellants.

2. That it was error to sustain said demurrer and to render judgment against these Appellants and in favor of the Appellee.

3. That it was error to hold that in the contract between the mission and the Hawaiian Government there was no agreement for affirmative religious teaching but merely that no heterodox instruction should be allowed, and in holding that no breach of agreement resulted from ceasing to teach the prescribed doctrines.

46 4. That there was error in failing to hold that the agreement that the said Institution shall be conducted at the ex-

pense of the Hawaiian Government as an institution for the cultivation of sound literature and solid science of itself was an agreement to continue that Institution upon the same principles and the same general character as it had previously been conducted, namely as an institution for the inculcation, amongst other purposes, of religion, and of the doctrines contained in the Confession of Faith annexed to the Agreement.

5. That it was error to hold that the terms of the agreement are not of doubtful import, since in case these terms do not import an absolute agreement to continue religious instruction of the character for the giving of which the school was founded, the terms at least are of such doubtful import as to require the evidence of the surrounding circumstances and the subsequent construction to control.

6. That it was error to hold that the practical construction placed upon this contract by the Government over a space of fifty years, and the uniform admission of the obligation to teach the doctrines specified, and the avoiding of the teaching of any other doctrines are not an admission of any obligation of the Government to teach such doctrines.

7. That it was error to hold that the conversion of the Institution into a Technical School under the name of the "Lahainaluna Agricultural School," in connection with the averment that the cultivation of sound literature and solid science has ceased, does not allege a breach of the agreement.

8. That there was error in holding that the agreement to teach solid science and sound literature is not violated by teaching
47 solely that literature which is limited by the study of science, or the science of agriculture.

9. That there was error in holding that an agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture exclusively.

10. That there was error in holding that a school primarily intended for the training of its students in the adaption of certain selected branches of knowledge to a handicraft or industry is a school of learning as well as a school of art within the meaning of the agreement.

Wherefore the said Appellants, Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, pray that the order of the said Supreme Court of the Territory of Hawaii, made in the above entitled action on the 3rd day of January, 1906, sustaining said demurrer and rendering judgment for the Territory of Hawaii be reversed, and that the Supreme Court of the Territory of Hawaii be ordered to overrule the respondent's demurrer to the petition in said action.

SMITH & LEWIS,
DAVID L. WITHINGTON,
CASTLE & WITHINGTON,
Attorneys for Petitioners, Appellants.

48 [Endorsed:] In the Supreme Court of the United States. Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, Appellants, *vs.* Territory of Hawaii, Appellee. Assignment of Errors. Filed January 18 1906 at 10:10 a. m. Henry Smith Clerk Supreme Court Ter. Hawaii Castle & Withington & Smith & Lewis, Attorneys for Petitioners, Appellants.

49 In the Supreme Court of the United States.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To the Territory of Hawaii, Greeting:—

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to an appeal, filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, are appellants, and you, the Territory of Hawaii are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Walter F. Frear, Chief-Justice of the Supreme Court of the Territory of Hawaii, this 18th day of January, in the year of Our Lord one thousand nine hundred and six.

W. F. FREAR,
Chief-Justice of the Supreme Court of The Territory of Hawaii.

50 In the Supreme Court of the Territory of Hawaii, October Term 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Petitioners,
vs.
THE TERRITORY OF HAWAII, Respondent.

Claim Against the Territory of Hawaii.

Appeal.

The above named petitioners, Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, conceiving themselves aggrieved by the order entered on the 3rd day of January 1906, in the

above entitled proceeding, do hereby appeal from said order to the Supreme Court of the United States, and pray that this appeal may be allowed, for the reasons specified in the assignment of errors; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Honolulu, H. T. 18th January 1906.

SMITH & LEWIS,
D. L. WITHINGTON,
CASTLE & WITHINGTON,
Attorneys for the Petitioners.

And now, to wit: On the 18th January 1906, it is ordered that the appeal be allowed as prayed for.

W. F. FREAR,
Chief-Justice of the Supreme Court of the Territory of Hawaii.

51 Service of the within and foregoing appeal and citation and the receipt of a copy thereof admitted this 18th day of January, 1906.

M. F. PROSSER,
Deputy Att'y General,
Attorney for the Territory of Hawaii.

[Endorsed:] Supreme Court of the United States. Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees *vs* The Territory of Hawaii. Appeal and Citation. Filed January 18 1906 at 10:10 a. m. Henry Smith Clerk Supreme Court Ter. Hawaii Castle & Withington Attorneys for petitioners.

52 In the Supreme Court of the Territory of Hawaii, October Term 1905.

FREDERICK J. LOWREY, GEORGE P. CASTLE and WILLIAM O. SMITH, Trustees, Appellants,
vs.
THE TERRITORY OF HAWAII, Appellee.

UNITED STATES OF AMERICA, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Appeal, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 51 inclusive, contain a true and complete transcript of the record and proceedings, including the Assignment of Errors and the original Appeal and Citation on Appeal, in said Court in the cause of Frederick J. Lowrey, George P. Castle and William O. Smith, Trustees, Appellants, against, The Territory of Hawaii, Appellee, as the same remain on record and on file in my office as the Clerk of said Court.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Honolulu, in the Territory of Hawaii, this 18th day of January in the year of Our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundredth and twenty-ninth.

[SEAL.] HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 20,075. Hawaii Territory supreme court. Term No. 195. Frederick J. Lowrey, George P. Castle, and William O. Smith, trustees, appellants, *vs.* The Territory of Hawaii. Filed February 1st, 1906. File No. 20,075.

Office Supreme Court, U.
FILED.
MAR 12 1907
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND WILLIAM O. SMITH,
Petitioners and Appellants,
vs.
TERRITORY OF HAWAII,
Respondent and Appellee.

No. 195.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BRIEF FOR APPELLANTS.

WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
W. O. SMITH,
A. LEWIS, JR.,
C. H. OLSON,
For the Appellants.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

FREDERICK J. LOWREY, GEORGE P. CASTLE AND WILLIAM O. SMITH, Petitioners and Appellants, vs. TERRITORY OF HAWAII, Respondent and Appellee.	No. 195. APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BRIEF FOR APPELLANTS.

STATEMENT.

Petition in the Supreme Court of the Territory of Hawaii under the laws of the Republic of Hawaii, Chapter 26, Laws of 1894-1895, now found in Revised Laws of Hawaii, 1905, Chapter 129, Secs. 2000-2008. The statute is modeled on the Act of Congress establishing the Court of Claims, and we give in the appendix those sections which define the jurisdiction and procedure.

It is a part of the history of the American people that the American Board of Commissioners for Foreign Missions was one of the manifestations of a new birth of religious life at the end of the Eighteenth and the beginning of the Nineteenth century. Great missionary societies were founded in England

in the last quarter of the Eighteenth Century, while the evangelical revival in America produced amongst its fruits the founding of Andover Seminary, anchored to a Calvanistic creed, the founding of the A. B. C. F. M. by the same men, upon the same principles, and the schism which separated the Congregational churches into the Unitarian and the Orthodox wing. One of the earliest, and distinctively the most successful of the missionary enterprises of the American Board was the Mission to these islands. The men called to its work were of the finest intellectual training, of high spiritual graces, and fired with a consuming zeal for the spread of God's kingdom in savage lands. They were, in their theological views, as Lowell said of the Puritans "narrow as the sword of righteousness is narrow," and the very fire of their zeal was kindled by the contemplation of the contrast between the condition of the lost and the saved soul. Their convictions irresistable compelled them to spread by every means in their power the knowledge of the doctrines set forth in their creed, the acceptance of which they believed to be a condition of salvation. For this reason after having with wonderful success instituted a system of Christian schools, attended by one-third of the nation, they procured in 1835 a gift from some of the chiefs of the Lahainaluna premises for a Mission Seminary, the purposes of which are set forth in its laws adopted and published in the same year, two of which are as follows:

"1. To aid the Mission in accomplishing the great work for which they were sent thither; that is, to introduce and perpetuate the religion of our Lord and Savior Jesus Christ, with all its accompanying blessings, civil, literary and religious."

"4. Another object still more definite and of equal or greater importance, is to educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow-laborers with us in disseminating the Gospel of Jesus Christ to their dying fellow-men." (Tr. p. 8.)

By the same laws the whole school met at daylight and sunrise each day for prayer, absence was marked, and the absentee called to account; on the afternoons of Tuesday and Thursday

the whole school met for biblical instruction, embracing the interpretation of the Scriptures, the evidences of Christianity, Archeology and Sacred Geography. Until 1849 the school was continued by the Mission as an institution of higher learning, with direct religious teaching and training in the doctrines held by the Mission (Tr. p. 8).

After the great Mahele by which the feudal or customary titles were turned into legal holdings, and the establishment of the Land Commission, the A. B. C. F. M. applied to establish its titles, including Lahainaluna, but, after introducing evidence, the latter claim was withdrawn, because of the arrangement with the Government, which is the basis of this suit. (Tr. p. 2.) That arrangement, occasioned by financial stress and the feeling that the school had really become a national institution which should be conducted by the Government, (which had become Christian,) at its own expense, but under the care of the Mission, culminated in a vote of the Mission at its annual meeting in April and May, 1849:

"To make over this Seminary to the Government, it being understood that it is to be conducted on the same principles as heretofore." (Tr. p. 2.)

Upon this, the Rev. W. P. Alexander, the Rev. C. B. Andrews and S. N. Castle, Esq., a committee, on April 25th, 1849, addressed a letter of that date to his Excellency Richard Armstrong, Minister of Public Instruction. After reciting the establishment of the institution, with the purpose "to promote the diffusion of enlightened literature and Christianity throughout the islands," the watchful care of the Mission, its unsparing exertions to procure these objects, that usually three, and at all times two, missionaries have been engaged in its work, its fruits scattered throughout the islands, that it had been planted and sustained by the American churches for the spread of the Gospel in heathen lands, the pecuniary embarrassment of the Board which had sustained it, that in view of the danger that this work might suffer for want of pecuniary means, and their belief that the highest interests of the Hawaiian people would be served by its transfer to his Majesty's Government, they propose to trans-

fer the institution, with all philosophical and other apparatus, its libraries, upon the express condition "that the said *institution shall be continued at its expense* as an institution for the cultivation of sound literature and solid science, and further that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission which we represent, a summary of which will be found in the confession of faith herewith enclosed." "In case of nonfulfilment or violation of the conditions" the property to revert to the Mission, the government to refund any necessary expense incurred in carrying on the institution while waiting the ratification of the committee, if no ratification be had. Of the confession of faith which was enclosed, and the confession which was substituted in its place, we shall speak hereafter. This letter was submitted to the Privy Council on April 26th, and the proposal accepted, subject to the ratification of the legislature, with the proviso that it should be optional with the Government to allow the institution to revert to the Mission in case of nonfulfilment of the condition, or to pay the sum of $15,000, and with the further important proviso that in case the Government should find it expedient to divert the establishment to other purposes than those of education, it should be at liberty to do so on condition "that it sustain an institution of *like character and on similar principles* in some other place on the islands or pay the sum of $15,000." The sum of $3,000 was appropriated for the support for the ensuing year, and the Minister of Public Instruction was authorized to conduct the seminary. (Tr. p. 12.) These resolutions were communicated to the committee on April 28th, and on the same day were adopted by the Mission (Tr. pp. 13-14), and it was provided that if further conveyance was necessary, such conveyance should be prepared. On the 8th of May, a substitute for the Articles of Faith was presented by the committee which, as the letter transmitting it shows, was intended to create greater restrictions in regard to religious instruction, the committee saying that the previous confession accorded with the belief of the churches sustaining the Mission so far as it went, yet would admit also teachings sub-

versive of Evangelical Christianity, which request was granted by the Government. The differences in the creeds are of the utmost importance from a Calvanistic standpoint, as it excludes alike Romanism, at which it was primarily aimed, and Unitarianism as well. The substituted creed calls for a confession of faith in the Trinity, the Lost Condition of Man, Free Grace, Particular Redemption, Effectual Calling, Everlasting Punishment, Close Communion, and Baptism only for the children of members of the church. It also declares the inspiration of the Scriptures and that they contain a system of Divine Truth for government and that there is a systematic theology. (Tr. pp. 4 and 5.)

The acceptance of the school was ratified by the legislature of Hawaii on July 11th, 1850, (see Appendix). After the transfer the institution was conducted exactly as before, in religion, instruction and the inculcation of sound literature and solid science (Tr. p. 3). The principals of the school were still members of the Mission and reported regularly to it as to their work in inculcating the doctrine held by the Mission and the result of their religious instruction, the school being maintained for the purposes for which it was originally instituted, namely, primarily, to raise up a class of educated Hawaiians who might become either ministers of the Gospel and thus diffuse religious instruction, or might fit themselves for high civil stations and be equipped for that by a thorough instruction in religious doctrines and by a public profession of religion which would be a safeguard and a guaranty for the future of religious work within the islands.

The reports to the Mission year by year show that this work was done, and that six who were connected with the school since it was taken over by the Hawaiian Government had become ordained ministers. (Tr. pp. 3-4.)

About 1865, and after the establishment of the Anglican Mission, the question of the power of the Government to maintain and control the school, and particularly whether the Mission had the right to nominate its instructors was raised. By that time in the common schools religious instruction had been eliminated,

but it was recognized that it was necessary to still teach the doctrines enumerated in the Confession of Faith and conduct Lahainaluna as a sectarian school. The letter of Attorney General Harris to the Board of Education, October 29th, 1864, (Tr. p. 4,) advises them that only those sects can control the school which teach the doctrines of each and all the articles of the second Confession of Faith, and if the Government was not willing to keep the conditions, the property and improvements must be restored to the A. B. C. F. M. In the following year the Board of Education declare (Tr. p. 5), "that a full compliance with the agreement consists in the appointment of persons teaching in the doctrine and after the manner of the Congregational and Presbyterian Churches of the United States," and if the Board did not see fit to carry on the institution, they must re-convey it or pay the sum of $15,000. The declaration quoted is contained in a letter to S. N. Castle, the attorney of the A. B. C. F. M., and arose out of a discussion of the right to control religious instruction by the Mission. Religious instruction, upon the lines pursued by the Mission and subsequently by the Government according to the agreement, continued until about the first day of July, 1903, when it ceased to be a part of the curriculum, and since then has been no longer given. The "cultivation of sound literature and solid science" has ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

Grounds on Which Petition Rests.

The grounds on which the petition rests are two:

First: That the Hawaiian Government took the property agreeing to continue the school upon the principles on which it was established and teach the faith upheld by the Mission; Second: That it agreed to continue it as an institution of learning, and that it has converted it into a technical school.

Upon both grounds the petitioners claim that they are entitled to the sum of $15,000, as upon either ground it is apparent that the Government has elected to retain the land for the purposes of the agricultural school.

Grounds of Territory's Demurrer.

The grounds of the demurrer (Tr. p. 18) are stated by the Court, in its opinion, as follows:

(1) That this Court has no jurisdiction of the claim for damages.

(2) That the United States, to whom the land has been ceded upon which the school is established, ought to be made co-defendant.

(3) That no cause of action is stated, it appearing:

(a) That the agreement was subject to ratification by the legislature and the act of July 11, 1850, relating to the Lahainaluna Seminary failed to set forth the terms on which the arrangement was made but merely that one had been made "whereby the seminary of Lahainaluna has been ceded to the King's government on condition that the government undertakes its support;"

(b) That the right of action, if any, accrued upon annexation in 1898, more than two years prior to the commencement of this action;

(c) That no breach of any condition is shown, and

(d) That if the conditions of the agreement were broken this was done in consequence of laws rendering the performance of them impossible.

(4) That the petition pleads conclusions of law in its assignment of breach of conditions, not setting forth in what respect the conditions were broken.

Decision of the Supreme Court of Hawaii.

The Court overruled the first, second and fourth grounds, subdivision (a) and (b) of the third ground, sustained sub-division (c) of the third ground, and expressed no opinion upon subdivision (d), holding that the question of the effect of subsequent legislation did not arise in view of its decision.

In sustaining the contention that no breach of any condition had been shown, the Court, after stating the claim of the petitioners and discussing some of the cases cited by them and deducing from them the rule that the contract must be of doubtful import in order to admit oral evidence, the Court continues:

"The terms of agreement are not of doubtful import,—they are as clear as language can express. Why it was that no condition was made which required the government to give religious instruction, why the representatives of the board thought that this condition would be observed although not expressed, and why it appears to have been regarded by the government as an implied condition, becomes evident, we think, upon reflection. No man of New England birth and training was unfamiliar with the general custom prevailing in the public schools of giving at least the amount of religious instruction included in morning prayers and scriptural readings; no one familiar with this custom, as were most, if not all, of the missionaries in Hawaii, would for a moment have doubted that some sort of religious instruction would continue indefinitely to be taught at the Lahainaluna school as well as all other schools. In the thought of the American board, and of the Hawaiian Mission as well, it was requisite merely to restrict such instruction to the inculcation of those doctrines in which they believed. Those officers of the Hawaiian government, who, like Attorney General Harris, were members of the protestant Episcopal Church, were perfectly aware of the distinctive theological tenets of their own church and of other evangelical churches of America and knew that the teaching at Lahainaluna of their own church doctrines would be to repudiate the agreement with the American Board and would result in a forfeiture of the property transferred to the government by the board unless the sum of $15,000 should be paid in accordance with the agreement; they did not, on their part, contemplate that which has come to pass, namely, that the school might receive no religious instruction upon any theological basis. One may regret that wise and devout Christian men in America, whose practical Christianity was sufficient to enable them in their several ways to accomplish so much for the uplifting of humanity, have found themselves unable to agree upon some form of religious instruction in the schools, but thus far this has not come about.

Whatever the reasons which influenced the Hawaiian government in treating the agreement as it did, its officers had no power to add to or subtract from its clearly expressed terms, nor did they by carefully avoiding the teaching of any doctrines, other than those mentioned in the agreement, thereby admit any obligation of the government to teach any doctrines.

As for the American Board, whether by oversight, or because they thought it unnecessary, or that it was unwise in view of the possibility of exciting antagonism in the legislature or in the

cabinet of the King, they did not incorporate in the agreement the requirement which the plaintiffs say was intended to be agreed upon. The Court has no right to take the agreement as meaning anything else than it clearly expresses."

Upon the second ground the Court says that an agricultural school does not eliminate but includes instruction in sound literature and solid science, holding that the science of agriculture cannot be taught without teaching at the same time literature relating to the science, and that as little literature was taught in American schools fifty years ago a technical school of this day would be as likely to impart in connection with technical studies correct and intelligent use of language as when made a separate subject of study.

ERRORS ASSIGNED.

Ten errors are assigned (72 pp., 27, 28), but they are all summed up in the error of sustaining the Demurrer as against both grounds set forth in the Petition in the light of the surrounding circumstances, and the subsequent construction by the parties.

ARGUMENT.

I.

THE CENTRAL PURPOSE OF THE AGREEMENT WAS TO "CONTINUE" AN ESTABLISHED INSTITUTION, THE KEY-STONE OF A SYSTEM WITH DEFINED AND WELL-KNOWN AIMS, THE CHIEF BEING THE PROMOTION OF RELIGION BY INSTRUCTION IN DEFINITE RELIGIOUS TRUTH.

The Agreement not integrated.

We observe that the agreement which the court is to construe was not one which the parties looked upon as setting forth in *haec verba* the final form of the agreement. The resolutions of the Mission, directed to be transmitted to the government, (Ex. E, Tr. pp. 13-14), show this.

It must be remembered that the Minister of Public Instruction was himself a missionary (the father of Gen. S. C. Armstrong), who had been recently called from the Kawaiahao church to this office, and it is probable that he was present at the meeting of the Mission when this vote was passed, as well as the vote of the Mission at the same meeting; "to make over this seminary to the Government; it being understood that it is to be conducted on the same principles as heretofore," and it would appear that he also contemplated the necessity of a further deed. (Ex. G, Tr. p. 16.) "It will be desirable I think when a deed of transfer is made, to incorporate this confession of faith in it. But this cannot be done until the transaction is ratified by the American Board and the Legislature of the Islands." But, as appears from Exhibit "H" (Tr. p. 16) when ratified by the A. B. C. F. M. no instrument of conveyance was executed and the matter dropped.

In construing the correspondence, the court should bear in mind that both parties contemplated that the language used was not a definite and final expression such as is contained in that class of documents from which the rule of interpretation of written documents arose, namely, engrossed writings, and all the more should look for the spirit of the agreement, the situation of the parties, their motives, their conduct, their after-construction of the agreement, and putting itself in their place construe it as the parties construed it.

Parol Evidence only Necessary to Show what is the Existing Institution.

We admit that parol evidence is necessary in order to apply the contract, for it was undoubtedly a part of the contract that an existing institution should be continued, and it is a matter of fact to be determined by parol evidence what that existing institution was.

This Evidence Shows that the Promotion of Religion by the Inculcation of a Definite System of Doctrine was the Central Purpose of the Mission and of the Seminary.

In resorting to parol evidence to determine the character of the institution to be continued, it is necessary to examine into its source, the purpose of its establishment, its aims, its methods, which inquiries reveal that the Mission from which it sprung believed in a system of theology, and believed absolutely and conscientiously that that system could be applied to the government of a state and was the only perfect rule of guidance, particularly for a savage nation in its rudimentary development to civilization and christianity. Therefore, they purposed to found in Hawaii a theocracy in which the Scriptures as interpreted by their creed should be the fundamental law, to inculcate which they established a system of schools in which the study of the Scripture and of religious truth was the primary purposes, of which system the Lahainaluna Seminary, from which preachers and teachers of that truth should go forth, was the key-stone.

This is consistent with the conduct of the parties at the time, their declarations in the correspondence and the construction which has been put upon the agreement in after years. Can it be, when the Mission has been lulled into security by the assurance of the Hawaiian government as late as 1865 that there was no misunderstanding as to the construction of the contract, that after forty years longer adherence it can now be repudiated?

Many other facts point irresistably to this conclusion, some of which we discuss more fully under another head and some now allude to.

This Purpose of the Mission well known.

In 1826 came the first clash and all the missionaries signed what has been termed their "Challenge" to the world, October 3rd, 1826, (Missionary Herald, Vol. 23, 1827, pp. 240-245). In this it is said:

"The general object of the American Board of Commissioners for Foreign Missions, was early stated to the public to be 'To propagate the Gospel in heathen lands, by supporting missionaries, and diffusing a knowledge of the Holy Scriptures.' In the year 1812, the legislature of Massachusetts gave their legal sanction to this object, and made a forfeiture of the funds of the Board, the penalty for unfaithfulness in the prosecution of it."

The instructions given to the missionaries on embarking are recited "to aim at nothing short of covering these islands with fruitful fields and pleasant dwellings, and schools and churches and raising up the whole people to an elevated state of Christian civilization."

They further declare that they have uniformly and perseveringly withheld advice from the chiefs or people "where we could not refer the decision of the question either to the Scriptures or to the uniform practice of Christian nations, but where the Scriptures are plain or the practices of Christians uniform, we have felt, and still feel, at liberty to speak with freedom." That they have inculcated in the chiefs not only the duties of morality, but that "he that ruleth must be just, ruling in the fear of the Lord;" that they have given them general principles derived from the Word of God, with Scriptural examples of their application, and conclude:

"If the doctrines and duties of Christianity, in which the Church of England, the Church of Scotland, the Presbyterian and other churches in America are agreed, are not adapted to correct the evils which exist in heathen nations; if these doctrines and duties, when faithfully taught, by precept and example, have no good influence to cure the evils of the human heart, and to promote virtue, order and happiness in society, then the missionary, and the philanthropist, too, may sit down together in despair and pronounce the evils among the heathens incurable; for if these fail we may challenge the wisdom of the world to devise a system of morals, and to propose any practical measures which will raise a savage tribe or a heathen nation from their native depravity to a state of civilization and virtuous life."

The result of this challenge was a trial before Capt. Thomas Ap Catesby Jones of the United States Sloop Peacock, which resulted in what he called in his published statement, "the most perfect, full, complete and triumphant victory for the missionaries that could have been asked by their most devoted friends." (Bingham p. 303.)

To Spread the Knowledge of the Scriptures and of these Doctrines Christian Schools Established.

To accomplish these purposes, they established a system of schools in which they had an aggregate of one-third of the entire population as scholars, in which the Bible was the chief text book and the teaching of moral and of evangelical truths the highest aim. The report of the Mission in 1835 (see appendix) shows that they taught by plain precepts the science of duty, used evangelical tracts and portions of Scripture as reading lessons for all the schools and endeavored to give them an influence similar to that of Sabbath schools.

To Train its Ministry, the Mission Established Lahainaluna Seminary in 1831.

Having in mind the purpose of training a Christian ministry, they established the Lahainaluna Seminary.

The Duty Understood by the Hawaiian Nation.

Nor was there any misunderstanding on the part of the Hawaiian nation. When the French priests came to the islands during the regency of Kaahumanu, in the very year of the establishment of this Seminary, when the elder Bingham remonstrated against the punishment of the papists, he asked Kaahumanu by what authority they were punished, she said: "By the law against idolatry, for they have violated that law in renewing the worship of images." (Bingham, p. 421.) She referred to the decree of Kamehameha II in 1819 abolishing idolatry before the arrival of the missionaries, as well as to the Ten Commandments, which had been adopted, if not formally, at least in spirit, as the law of the Kingdom six years before.

We refer the Court to Bingham's description of the relation of Church and State in the Hawaiian Islands, in these early days of Christianity, all of which he saw and a great part of which he was. He says the missionaries carefully guarded against a union of the church and state, yet the state is a religious institution deriving all its powers from God, its Chief Magistrate being emphatically God's minister, and being bound as well as their subjects to do God's will; that "it was a matter of admiration" to see Queen Kaahumanu and her counsellors aim-

ing to secure the inculcation of the principles of God's inspired Statute Book, making Christianity a part of the common law of the land, building sanctuaries and school houses in a state founded for the execution of God's will, in which he has put his statute book into the hands of his magistrates for their guidance. That Queen Kaahumanu and her counsellors regarded God's Statutes as binding on all without civil enactment, and "without specifically adopting the Ten Commandments as a criminal code or Christ's Sermon on the Mount as a civil code, they still sought to follow them as divinely inspired teachings." (Bingham pp. 278-282.)

This System of Religion Recognized in the Constitution of 1840.

It was further recognized both in the Declaration of Rights of 1839 drawn up at Lahainaluna by a graduate (Blackman, Making of Hawaii, p. 1061), and in the first Constitution of Hawaii granted by Kamehameha III October 8th, 1840, portions of which we give in the appendix, in which it is declared that God is the creator of all nations, the bestower of rights, that the office of ruler comes from God, that the Kingdom should be governed by his laws, wherefore it is provided "that no law shall be enacted which is at variance with the word of the Lord Jehovah or at variance with the *general spirit of his word.*" By "the general spirit of his word" is meant as interpreted by the Mission. It was under this constitution that the contract in question was made.

By the Laws.

Furthermore, by the laws of 1842 quoted in the appendix, the Mission Seminary was recognized as a part of the school system and its scholars freed from money taxes. By the same laws a rigid enforcement of the Sabbath was provided, on the ground that the nation cannot "enjoy peace nor the people prosper unless they are taught in morals and religion."

In the Ordinance Against the French Priests.

It was recognized again in the ordinance rejecting the Catholic religion on December 18th, 1837, in which Kamehameha III forbade its teaching, on the ground "that it is not proper that two religions should be found in this small Kingdom." (Jarves' History of the Sandwich Islands, Boston, 1843, pp. 390-392.)

By Kamehameha III to the American Consul.

Again, by Kamehameha III in his reply to the United States Consul as to the influence of the Protestant missionaries in the expulsion of the priests, in which, after reciting the arrival of the Protestant missionaries, their communicating instruction in letters, delivering the word of God, and the chiefs and people turning to them to be instructed in letters, "for those things were in our opinion really true," he again refers to Mr. Bingham's remontrating with Kaahumanu on the ground that there was no law to punish the Papists, and recites Kaahumanu's reply that there was the law respecting idolatry, "the worship of which we have forshaken." (Jarves, pp. 393-395.)

And to the French Commander.

Again, in the correspondence between Kamehameha III and the Captain of the French Sloop Embuscade in 1842, the first demand of the French commander was "that a Catholic High School, with the same privileges as the High School at Lahainaluna, be immediately acknowledged, and that a lot of land be granted to it by the Government, according to promise." To this demand the King acceded on the ground that the laws favored literature. (Bingham, pp. 590-591.)

By President Tyler in a Message to Congress.

It was recognized by President Tyler in his message to Congress, December 31, 1842, in which he says of Hawaii, while dealing with the subject of the French intervention:

"Just emerging from a state of barbarism, the government of the islands is as yet feeble; but its dispositions appear to be just and pacific, and it seems anxious to improve the condition of its people by the introduction of knowledge, of religious and moral institutions, means of education, and the arts of civilized life." (Jarves, p. 375.)

In the Existing Literature of the Islands.

It is a recognized fact in the literature of the Islands prior to the transfer of the Seminary. We have quoted from Bingham and Jarves, standard literature of the Islands at the time of this contract; but the work with which the Islands were most familiar was Dibble's History of the Sandwich Islands, printed at Lahainaluna in 1843, which had been in large part published earlier both in the Hawaiian and in the English language. The Rev. Mr. Dibble taught at Lahainaluna for many years. His work breathes the purpose of the schools, and particularly of Lahainaluna, and he discusses the purpose of education at great length and urges as reasons for it (Dibble, pp. 289-304):

1. That without schools there cannot be intelligent hearers of the Gospel.

2. They afford the most favorable opening for communicating Gospel truths.

3. They raise up native preachers.

4. And other laborers in the Gospel work.

5. They enable laborers to become skilled, instead of being unskilled, so as to diversify employment. But he says of this system of education:

"When I speak of a system of education, I mean, of course, a system baptized with the Holy Ghost—most thoroughly under the influence of the religion of Christ, entered upon and prosecuted at every step with fervent and humble prayer." (Dibble, pp. 301-302.)

6. Without schools the people will relapse and grow hardened against the influences of Christianity, with schools they can be trained in religious feelings and moral habits and safely gathered into the fold of Christ.

7. Schools are necessary to guard against the insidious efforts of Romanists.

8. The training of native helpers is called for on account of local circumstances.

9. It will be a source of help in evangelizing the whole Pacific.

After this general statement of the purpose for which the Mission has entered into the cause of education, he says the Mission Seminary first claims attention, and after defining it as defined in its laws as before quoted, he gives an account of the history and purposes of that school too long to quote (pp. 305-318), and in describing it says of its pupils:

"They answer with readiness questions in history, philosophy and religion and demonstrate with precision problems and theorems of the exact sciences. They are in process of training to be teachers and preachers to their own countrymen, and to other barbarous nations. Already scholars from the school have been of immense service to teachers, catechists, exhorters and as advisors to the chiefs." (Dibble, pp. 336-7.)

It is therefore a fact recognized by the Constitution, by the laws, by public decree, by historical proof and by general knowledge that the Mission Seminary had for its chief aim the promotion of religion by the inculcation of definite religious truth as held by the Mission Fathers, and this fact known to the parties to the agreement shows in connection with the correspondence that the central purpose was to continue the institution with these definite and known aims and this well settled course of instruction.

Turning to the adjudicated cases for rules of construction,

A term can be read into a contract from the surrounding circumstances.

Said the Supreme Court of the United States in a case which has been a leading case on this subject:

"It is a principle recognized and acted upon as a cardinal rule by all courts of justice, in the construction of contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated."

Bradley v. Washington, Alexandria & Georgetown Packet Co., 13 Pet. 89: 10 L. ed. 72.

In this case where the contract, growing as this one did out of correspondence, showed an agreement to pay for a steamboat at a certain rate per day, there was read in the understanding of the parties that the time when navigation was closed was to be deducted, and to show this the Court admitted evidence that all the parties knew that during such time the transportation was overland.

"Extrinsic evidence is admissible, of all the circumstances surrounding the author of an instrument, to explain the sense in which he understood it."

Reed v. Merchants' Mut. Ins. Co., 95 U. S. 23: 24 L. ed. 348.

The authorities are cited in a note to *Field v. Munson*, 47 N. Y. 221, in the edition annotated by Brown and Cook; also 6 English Ruling Cases 169, and the following cases, which sustain the decision in the case in Peters, that even if there is no provision in the contract, evidence of the circumstances may be offered to show that such was a part of the contract.

Shouse v. Doan, 39 Fla. 95, 21 So. 807.

Merchants' & Mechanics' Savings Bank v. Fraze, 9 Ind. App. 161, 36 N. E. 378.

Staples v. Edwards & McCullock Lumber Co., 56 Minn. 16, 57 N. W. 220.

O'Dea v. City of Winona, 41 Minn. 424, 43 N. W. 97.

Jennings v. Whitehead Co, 138 Mass. 594.

Erskine v. Adeane, L. R. 8 Ch. 756.

Katz and Bedford, 77 Cal. 319.

People's National Gas Co. v. Braddock Wire Co., 155 Pa. St. 22, 25 Atl. 749.

Cleburne Water Co. v. Cleburne, 138 Tex. Civ. App. 141, 35 S. W. 733.

Nilson v. Morse, 52 Wis. 240, 9 N. W. 1.

A term can be read in from the construction by the parties.

It is not necessary to go to the surrounding circumstances in order to explain this contract since the parties have put their own construction on it. "Tell me," says Lord Chancellor Sugden, "what you have done under a deed, and I will tell you what that deed means." The Circuit Court of Appeals of the 8th Circuit says "this remark of the Lord Chancellor has come to be accepted as a maxim in the construction of contracts," citing a large number of cases.

Chicago G. W. Ry. Co. v. N. Pac. Ry. Co., 101 Fed. 792.

In that case a provision was read into a contract which the court found was intended from the after-construction by the parties, referring to an earlier case in the Federal Reports, one of the numerous cases arising in the Wabash foreclosure, in which the court says:

"'A construction of a contract adopted and acted upon by both parties will be regarded as worked into the contract,' says Dr. Wharton in his work on Contracts, Vol. 1, Sec. 206, if such construction does not conflict with its express provisions. The manner in which a construction of a contract adopted and acted upon by both parties may, so to speak, be worked into a contract, is well illustrated in *Topliff v. Topliff*, above cited, and also in the case of *Robinson v. U. S.*, 13 Wall. 363."

Central Trust Co. of N. Y. v. Wabash St. Louis & P. Ry. Co., 34 Fed. 254, 256.

These cases are supported by abundant authority.

Thus contemporaneous construction may be considered,

Union Pac. Ry. Co. v. Anderson, 11 Colo. 239, 18 Pac. 24;

Cornwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611;

Merchants' & Mechanics' Savings Bank v. Fraze, ubi supra;

and subsequent construction,

Webster v. Clarke, 34 Fla. 637, 16 So. 601;

Consolidated Coal Company v. Schneider, 163 Ill. 393, 45 N. E. 126.

Hill v. City of Duluth, 57 Minn. 231, 58 N. W. 992.

First National Bank v. Jagger, 41 Minn. 308, 43 N. W. 70.

Paxton v. Smith, 41 Neb. 56, 59 N. W. 690.

Cincinnati v. Cincinnati, Etc., Co., 53 Ohio St. 278 41 N. E. 239.

Fuller v. Baxter, 59 Vt. 467, 8 Atl. 493.

Hosmer v. McDonald, 80 Wis. 54, 49 N. W. 112.

It has even been held that the testimonies of the parties may be received directly as to their understanding when there is any ambiguity.

Ganser v. Fireman's Fund Ins. Co., 36 Minn. 74, 35 N. W. 584.

Cleburne Water Co. v. Cleburne, ubi supra.

And that the practical construction by the parties should prevail over any mere technical interpretation.

Davis v. Ravenna Creamery Co., 48 Neb. 471, 67 N. W. 436.

The decisions in the Supreme Court of the United States fully sustain the principles on which we contend:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269; 24 L. C. P. 410.

"The practical construction which the parties put upon the terms of their own contract, and according to which the work

thereunder was done, should prevail over the literal meaning of the contract, where one party thereto seeks to obtain a deduction in the contract price in accordance with such literal meaning."

District of Columbia v. Gallagher, 124 U. S. 505: 31 L. ed. 526.

"In cases where the language used by the parties to the contract is indefinite and ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence."

Topliff v. Topliff, 122 U. S. 121: 30 L. 1110.

"Acquiescence for ten years, by the parties, in a certain construction of a contract is evidence of the intention of the parties in making it." The publishers took the whole copyright. At the time contract was made the copyright lasted 28 years, it was afterwards, by act of Congress, extended 14 years, author claimed the copyright after termination of 28 years. Held, he had sold his entire interest.

Paige v. Banks, 13 Wall. (U. S.) 608: 20 L. 709.

To the same effect,

Philadelphia R. R. Co. v. Trimble, 10 Wall. (U. S.) 367: 19 L. 948.

"Where the language used by the parties to a contract is of doubtful construction, the practical interpretation by the parties themselves is entitled to great if not controlling influence."

Chicago v. Sheldon, 9 Wall. (U. S.) 50: 19 L. 594.

"The practical interpretation which the parties by their conduct have given to a written instrument, is always admitted, and is entitled to weight as to the intention of the instrument."

Cavazoo v. Trevino, 6 Wall. (U. S.) 773, 18 L. ed. 813.

This role has been uniformly followed by the Federal Courts.

Rockefeller v. Merritt, 76 Fed. 909.
Leavitt v. Windsor Land & Investment Co., 54 Fed. 439.
Foster v. Goldschmidt, 21 Fed. 70.
Nickerson v. Atchinson T. & S. F. R. Co., 17 Fed. 409.

As has been said by the Supreme Court of Vermont *(White v. Amsden,* 67 Vt. 1, 30 Atl. 972):

"The great object indeed the only foundation of all rules of construction of contracts is to come at the intention of the parties. If the words of a contract are equivocal, resort may always be had to the circumstances under which the contract was executed and to the contemporaneous construction given the contract by the parties, as evidenced by possession or similar acts. The subsequent acts of the parties have always been admitted to show how the parties understood their contract and as a practical construction of it."

In this case the record leaves no doubt of the construction the parties put upon the contract.

II.

THE INSTRUMENTS CONSTRUED AS A WHOLE MAKE IT A NECESSARY INFERENCE THAT THE MAINTENANCE OF RELIGIOUS INSTRUCTION AND TRAINING IN THE DOCTRINES OF THE MISSION WERE A PART OF THE CONTRACT, AND THIS TERM WILL BE READ IN.

It is not necessary to go to the construction of the contract by the parties or to the surrounding circumstances, more than to determine the character of the institution, or to the rule laid down by Wharton, cited in the Wabash case, that the construction of a contract adopted and acted upon by both parties would be regarded as worked into the contract, for all these instruments are to be construed as a whole and a term which can be inferred from a consideration of the entire negotiation is as much a part of the contract as if expressly set forth, and this contract as clearly shows as if it were expressly set forth that the maintenance of religious instruction and the training in the doctrines held by the Mission was as much a part of the condition as that other doctrines should not be taught.

"Since a contract is to be construed as a whole, terms which can be inferred from a consideration of the entire instrument are as much a part of the contract as if expressly set forth therein,"

2 Page on Contracts, 1740 Sec. 1118.

Courts have even gone so far as to hold that where the contract speaks of one, the plural can be inferred.

Halt v. First National Bank, 133 Ill. 234.

And a conveyance for use as a burial place for a member of the Roman Catholic church in consecrated ground would restrict the lot holder from interring therein any person not recognized by the church authorities as a Catholic, although no such clause was in the agreement.

In this case, the court said, as to the incorporation in the contract of the laws, usages and discipline of the Roman Catholic Church:

"In the absence of any special contract, excluding this *status* by the omission of a restriction in a formal deed or agreement, the presumption is a just and reasonable one that such *status* was a part of the transaction, and that the laws and usages to which we have referred were understood by both parties as lying at the very root of the negotiation, and pervading it throughout."

Dwenger v. Geary, 113 Ind. 106: 14 N. E. 903.

The vote of the Mission was (Tr. p. 2), "to make over the seminary, it being understood it was to be conducted on the same principles as heretofore," which principles are to aid the Mission in accomplishing the great work for which they were sent, to introduce and perpetuate the religion of Jesus Christ, and to educate young men of piety as teachers of religion (Tr. p. 8). The letter of the committee, after reciting the establishment of the institution in order to promote the diffusion of enlightened literature and Christianity throughout the islands, how it had been cherished by the Mission, that no means had been spared to secure the object of its establishment, that it had been planted and sustained by the American Board out of donations given for the spread of the gospel, that the Board is indebted, and as a consequence must diminish its expenditures, and will be unable to carry on the work, and believing that the transfer of the institution to the fostering care and patronage of the government will promote the highest interests of the Hawaiian peo-

ple, submits the proposition to relinquish the property known as the "Mission Seminary" to the Government, provided that the Government agrees that *"the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and further that it shall not teach, or allow to be taught any religious tenet contrary to those heretofore taught by the mission,"* and again, the institution is to be temporarily transferred, pending the confirmation by the Board, to be retransferred in case of failure of such confirmation, showing that they expected to receive back the same institution which they turned over.

The Government's view is further shown by the resolutions (Tr. p. 12), "to allow the institution with all additions and improvements to revert to the said Mission to be held on behalf of the American Board of Commissioners for Foreign Missions, or to pay the sum of $15,000; provided also that in case this Government shall find it expedient to divert this establishment to other purposes than those of education, it shall be at liberty to do so on condition that it sustain an *institution of like character and on similar principles* in some other place on the islands or pay the sum of $15,000 to said Mission."

Here is an express declaration that a fundamental purpose of the transfer was to sustain an institution either at Lahainaluna or some other place in the islands *"of like character and on similar principles,"* and the Government had the option to remove the institution, but if it failed to maintain an institution of like character and on similar principles, it can retain the property by payment of $15,000 to the Mission.

Again the agreement is to continue the "Mission Seminary," and while the word has in popular significance a wider meaning the context here shows that it was intended to be a Seminary for the training of Ministers.

Again, in the letter of the committee submitting a substituted confession of faith, there is to our mind a conclusive evidence that religious instruction in accordance with the confession of faith was the central feature of the institution transferred, and that this was to be maintained. Not satisfied with the first confession which they say would admit of teachings subversive to

Evangelical Christianity, they submit an iron-bound confession of faith which we have already characterized. Can anyone reading this confession for a moment believe that it was in accordance with the agreement of transfer that no religious instruction was to be given when the very object of the Mission was to recall lost men and bring to their knowledge the truths of Evangelical Christianity? Can it be conceived that the Mission Fathers for a moment were making no conditions for the teaching of doctrine where they provide that nothing inconsistent with *these doctrines* shall be taught,—or what is still more to the point, can it be for a moment contended (to use the words of the letter) that it would not be "subversive to Evangelical Christianity" to maintain the institution without religious instruction? We think no one who reads the confession of faith set forth in the second letter can draw from this confession of faith which was to be incorporated into the deed of conveyance any other inference than that it was in the minds of these men trained in the Shorter Catechism that religious instruction should be maintained and that the failure to give any religious instruction at all would be as much a teaching of religious tenets or doctrines contrary to those heretofore inculcated by the Mission, the chief of which was the necessity of religious instruction, as if it were expressed in so many words.

Etymological Definition of the Terms Show the Purpose to Continue the Instruction to Promote Definite Religious Truths.

The etymological definitions of the terms clarify the meaning. The Government was to continue the Seminary. The Century Dictionary defines "continue" as "to cause to remain as before," and "Seminary" as "Specifically a school for the education of men for the priesthood or ministry." Primarily, a Seminary is a seed plot, the seed which these missionaries sought to sow in Hawaii was the Word of God as interpreted by the Confession of Faith which they made a part of this transaction.

III.

THE BIBLE WAS THE SOUNDEST LITERATURE AND RELIGION AS HELD BY THE MISSION, THE MOST SOLID SCIENCE IN THE MINDS OF THE PARTIES TO THIS CONTRACT AT THAT DATE, 1849, AND AT THAT PLACE, THE HAWAIIAN ISLANDS.

The men who were making this contract were living in a land rescued in that generation from heathenism, converted into a Christian nation under the influence of the American Mission. To the missionaries and to the people of that land sound literature and solid science had a more limited meaning than it has to the minds of the American people of this generation. The learned judge who wrote the opinion in the Court of Hawaii recognizes this when he says that "then no one would have doubted that religious instruction would continue indefinitely in this school as well as in all other schools; that it was requisite merely to restrict such instruction to the inculcation of those doctrines in which they believed." It was then within the contemplation of the parties, by the admission of the court that religious instruction would be given and that this instruction would be confined to the doctrines held by the Mission. Our present contention is that this understanding is incorporated in the language of the instrument.

It has been the universal admission of critics of all times that the Bible contains the best of literature and when in a communication of the Mission the words sound literature as a requirement was inserted, the Mission meant to include the best and soundest of literature. The word "sound" is used in the sense of substantial, true, reliable, as distinguished from that which is unsound or fallacious.

The word "solid" is used in the same sense and when the Mission used the term "solid science" they meant the oldest and most solid of sciences, religion. They understood the distinction between religion and the exact sciences, which is drawn in one of the extracts from Dibble already referred to.

Socrates, who is the founder of the scientific method and the first of moral philosophers, held that there was no science of physics, but only of metaphysics.

That Kamehameha III, the other party to the contract, considered religion a science is shown by the Constitution of 1840, which he promulgated, which recognized that government had its source and finds its limitations in religion, and in the expulsion of the Papists he had already declared that the state had a definite system of religion (taught by the missionaries) and that to introduce another would cause confusion.

All parties recognized it, for the substituted Confession of Faith (Tr. p. 15) declares that the Scriptures contain "a complete and harmonious system of divine truth, and are the only true rule of Christian faith and practice, and that God is not only the maker of all things, but that he governs all things according to his will, and that the principles and administration of this government are wholly just and good," an explicit declaration that the proper government of a state is a theocracy, that there is a science of systematic theology, and that the laws of this science are found in the Scriptures as interpreted by this creed.

Finally there could be no misunderstanding by either party. The design of the Seminary is set forth in its laws. In the petition is given (1.) and (4.) of Chapter I on its Design (Tr. p. 8), (1.) which sets out the primary object to aid the Mission in introducing and perpetuating the religion of Christ with all its accompanying blessings, civil, literary and religious; the Chapter then continues:

"2. As a means of accomplishing this great end, it is the design of the Seminary to disseminate sound knowledge throughout the Islands, embracing general literature and sciences, and whatever may tend to elevate the whole mass of the people, from their present ignorance and degradation, and cause them to become a thinking, enlightened and virtuous people."

We note that sound knowledge is said to embrace general literature and the sciences. Hence the expression "sound knowledge" is equivalent to that used in the resolutions of "sound literature and solid science."

What the people of the islands and what the missionaries understood by disseminating "sound knowledge" throughout the islands is shown by what they had done, which was to print and circulate the Bible, to teach it as a text book, and to teach the science of religion held by the Mission. When, therefore, they said that the Seminary was to be continued as an "institution for the cultivation of sound literature and solid science," they were using the same term which expressed the existing purpose of the institution, and of that existing purpose there could be no misunderstanding, because for eighteen years it had been in full operation carrying out that purpose. Therefore, when the parties declared that the Seminary should be continued as an institution for the cultivation of sound literature and solid science they understood that it was to be continued for the same purpose for which it was originally established.

Where two phrases are used as meaning the same thing, and one interpretes the meaning, such interpretation is to be followed in the interpretation of the contract.

Simpson v. United States, 199 U. S. 394.

An academy established for "the purpose of promoting religion and morality, and for the education of youth in such of the liberal arts and sciences as the trustees shall direct," is a literary and scientific institution.

Wesleyan Academy v. Wilbraham, 100 Mass. 599.

IV.

IF SECULAR LEARNING IS EXCLUSIVELY INTENDED A TECHNICAL SCHOOL IS NOT AN INSTITUTION FOR THE INCULCATION OF GENERAL LEARNING, BUT FOR SPECIAL AND TECHNICAL EDUCATION.

The second ground of recovery alleged in the amended petition is the violation of the condition of transfer and agreement of the Government that the Government should continue the school at its expense as an institution for the cultivation of sound literature and solid science.

This breach is stated as follows: That "on or about July 1, 1904, the said Government ceased to continue the said school as an institution for the cultivation of sound literature and solid science, contrary to its agreement." (Tr. p. 7.) It is further alleged that "the institution has become a technical school under the name of "The Lahainaluna Agricultural School." (Tr. p. 5.)

The petition alleges that, before the transfer to the Government, "the course of instruction comprised * * * the usual topics belonging to secular learning." (Tr. p. 1.) Under the alleged condition and agreement, the Government became obliged to *continue* the school as an institution for the cultivation of sound literature and solid science. In other words, the continuance of the school as an institution for the inculcation of standard secular learning, was required, for a "school for the inculcation of sound literature and solid science" is a "school for the inculcation of standard learning." The terms are synonomous and interchangeable. That they were so in the minds of the parties is clear from the use of the word "continue." But without this clear indication of the intention of the parties, it is submitted that such is the common understanding of the terms.

Literature is "the class of writings in which expression and form, in connection with ideas of permanent and universal interest, are characteristic or essential features, as poetry, romance, history, biography and essays, in contradistinction to scientific works, or those written expressly to impart knowledge." (Century Dictionary.) Science, on the other hand, is "knowledge gained by systematic observation, experiment, and reasoning; knowledge coördinated, arranged, and systematized; also, the prosecution of the truth as thus known, both in the abstract and as a historical development." (Century Dictionary.)

The terms "literature and science" thus, in common parlance, cover the general field of knowledge and learning, each defining a part of the field. It follows that a school for the inculcation of literature and science, is a school for the inculcation of general learning and knowledge. In order to come within the term, its purpose must be to impart general education.

A technical school, on the other hand, is not a school the purpose of which is to impart general education or general learning. Its purpose is to teach the adaptation and application of particular kinds of knowledge to the industries of life. In the words of Huxley, "technical education * * * means that sort of education which is specially adapted to the needs of men whose business in life is to pursue some kind of handicraft." The definition is particularly applicable to the education afforded by an agricultural school.

When, therefore, the transfer of the school at Lahainaluna was made, the condition of the transfer was that its character as a general educational institution should be maintained. But its transformation into an agricultural school has changed its character from that of a school for the inculcation of general education to that of a school for the inculcation of special and technical education. It does not, therefore, meet the requirement that the school be maintained as a school for the cultivation of "sound literature and solid science."

The territorial supreme court dealt with the condition of transfer as if it merely required that literature and science should be taught in the school, whether incidentally or as the purpose of the school. The court says, "An agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the literature relating to the science. We are not prepared to say that such literature, so taught, is not as sound or as valuable as are literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science."

With all respect, we insist that the condition was not merely that science and literature should be taught in the school; it was that the purpose and design of the school should be the cultivation of sound literature and solid science. It was intended thereby to define the character of the school required to be maintained by the Government. The construction of the Territorial court disregards the requirements of a definite character for the school, that of being a literary and scientific institution and is

satisfied with incidental instruction in literature and science. But we submit that incidental instruction of literature and science does not make a technical school, and particularly an agricultural school, a literary and scientific institution.

While a question of language primarily, the question has received judicial construction in a number of cases and the distinction stated has been uniformly recognized.

Thus in *Detroit Home & Day School v. City of Detroit*, 76 Mich. 521: 43 N. W. 593, the Michigan Supreme Court said: "But it is a matter of common knowledge that all general educational establishments have universally been known as 'scientific institutions,' and fall naturally and directly within it. A 'scientific institution,' under the language of all civilized countries, means an institution for the advancement or promotion of knowledge, which is the English rendering of 'science.'" A technical school does not come within this definition. Its purpose is not the promotion of knowledge for itself; its purpose is much more special,—the training of men for particular industries and in the application of selected branches of knowledge.

In *Lichentag v. Tax Collector*, 46 La. Ann. 572: 15 So. 176, the court was called upon to decide whether or not the building of a school of stenography and typewriting was exempt under a provision of the constitution exempting property used for colleges or other school purposes.

The court first held that the word "school" was used in the constitution to describe general educational institutions, the purpose of which is the inculcation of knowledge and mental training. The court then, after comparing stenography and typewriting with music, painting and other special forms of accomplishment, which are generally taught in schools and colleges, said: "Yet no building exclusively devoted to the teaching of these arts would be exempt from taxation for the reason that they do not necessarily enter into any scheme of general knowledge, and are not essential to the training of mental faculties. Stenography is an art; shorthand writing, the use of abbreviations or characters for whole words. Typewriting can scarcely rank as an art, and may be classed as a mechanical occupation, like the setting of type. Neither of these occupations enter into

any scheme of education for the acquisition of knowledge or the training of mental faculties. That they incidentally improve some faculties cannot be disputed; that they may have a healthy influence on all the faculties may be admitted; but many mechanical occupations do the same thing. It is difficult to conceive of any exercise of the physical powers without in some degree exercising a wholesome influence on the mental faculties. The occupation of the plaintiff, which he is teaching to his pupils, presupposes an acquisition of knowledge and a mental training, and the object of the school is not for the purpose intended by the primary or common school or academy. It is the teaching of a trade which the pupils expect to follow for a livelihood. Schools for lawyers and doctors, exclusively devoted to the preparing of them for their professions, presuppose a previously acquired fitness, and they enter into no general plan of common education. The school buildings for these purposes are not exempt, as they are intended for a special class and special purposes or professional calling. And so it is with plaintiff's school. It is intended to educate a particular class for a special object and for a special calling, as an occupation by which to make their way in life. The occupation presupposes all that is required for such a calling as being obtained in some school or college devoted to the purpose of imparting knowledge and mental training."

The court thus having first determined that the word "school" as used in the constitution, meant a school for the cultivation of general knowledge and learning, had no difficulty in placing technical schools without the exemption provided by the constitution.

The case of *Omaha Medical College v. Rush*, 22 Neb. 449: 35 N. W. 222, is not a contravening authority, for there the court construed the word "school" as used in the statute under consideration as not limited to schools for the cultivation of general knowledge and learning. If it be conceded that the word "school" as used was not limited to schools for the cultivation of general knowledge and learning, the court rightly held a technical school within the term as used in the statute.

The precise question was squarely raised in *The People v. Gunn*, 96 N. Y. 317. In that case, the question was whether or not the defendants, constituting a medical school, were legally incorporated by virtue of an enabling act, declaring "all scien-

tific and all literary colleges and universities organized under" certain acts to be legally organized under certain conditions. It was held that they were not legally incorporated. The court said, "We are of opinion that these acts did not authorize the formation of a medical college. According to the ordinary use of language, a medical college would not be described as a scientific institution. It would not be generally classified as such." Again, "As we have already stated, the terms 'literary or scientific college or university' do not embrace a medical college. Section 2 provided that 'all scientific and all literary colleges and universities organized under said acts which shall have reported to the said regents within two years last past, are hereby declared legally incorporated.' The United States Medical College is not a scientific or literary college, and hence again is not embraced within this language."

See also:

Ex parte St. John Law Society, 30 New Bruns. 501: 12 Am. & Eng. Encyc. of Law 332 (2d. ed.), note 6 to p. 331.

Indianapolis v. Sturdevant, 24 Ind. 391.

Commissioners v. Lorrest, L. R. 15 App. Cas. 334.

Mass. Ag. Coll. v. Marden, 156 Mass. 150: 30 N. E. 555.

New Eng. Theos. Corp. v. Boston, 172 Mass 60: 51 N. E. 456.

The Territorial Supreme Court disposes of the foregoing quoted and cited cases in the following words: "Cases are cited which discuss the meaning of literary and scientific institutions, technical schools and schools generally with reference to exemption of property from taxation, but this case does not demand strict construction of a statute which exempts property from taxation."

In none of these cases does it appear, however, that the necessity for strict construction arose. In every case, the question is treated as a matter of common understanding of language.

While an agricultural school is undoubtedly scientific in character, it does not come within the ordinary and common meaning of the expression "literary and scientific institution." Its purpose and design is the training of its students in the application of the restricted branches of knowledge involved in the

special line of industry to be pursued. It is intended to develop experts in the particular handicraft. Incidentally the training involves the acquisition of knowledge, but knowledge of a special character, knowledge which is not intended as the end of the institution, but the means to another and definite end,—the training of men for a specific occupation. Its purpose is not simply to give its students educations; it is to make them experts in a particular occupation.

Since, then, the condition of transfer was intended to define the character of the school to be maintained by the Government, and the character defined is that of a literary and scientific institution, and the school has been transformed into an agricultural school, a technical school, which does not come within that definition, we submit that on this ground also the petition states a good cause of action and that the Territorial Supreme Court erred in holding otherwise.

V.

MINOR GROUNDS OF DEMURRER.

All the other grounds of demurrer were overruled by the Territorial Supreme Court with the exception of the question of impossibility of performance, which, while not specifically, we think, was necessarily also overruled.

We quote the clauses on which defendant relies:

Constitution 1894, Article 97.

"From and after December thirty-first, 1895, no public money shall be appropriated nor public land conveyed to or for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government."

Organic Act, Sec. 55.

"Nor shall any public money be appropriated for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government."

These are the familiar provisions intended to prevent compulsory taxation for the benefit of a religious sect.

State v. Halleck, 16 Nev. 373.

The first amendment to the Constitution of the United States prohibiting Congress from passing any law respecting the establishment of religion is of very limited significance. It has been held not to protect citizens in their religious liberty.

Permoli v. New Orleans, 3 How. 589; 11 L. 739.
Ex Parte Garland, 4 Wall. 333; 18 L. 366.

Under it an appropriation by Congress to a hospital conducted by a monastic order has been sustained.

Bradford v. Roberts, 175 U. S. 291, 44 L. 168.

There are numerous reasons why the provisions do not apply.

(a) The maxim *noscitur a sociis* makes them read "any denominational, sectarian, or *other* private school." A public school is neither sectarian, denominational or private, although it may teach doctrines which are sectarian or denominational. What is forbidden is the appropriation of money to a sectarian school; the familiar definition of a sectarian school as a school controlled by a sect and teaching certain sectarian doctrines.

State v. Trustees, 7 Ohio St. 64.

(b) This conclusion is further strengthened by the clause "or any school not under the exclusive control of the government."

(c) It does not follow that any money has been appropriated for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government; it is only shown that property has been entrusted to the Government as Trustee for this purpose.

(d) It is not intended to control the power of the State in its own institutions, and this has been shown by the action of the legislature.

(e) A better answer is that although it is inconsistent with the spirit of these provisions that sectarian religious instruction should be given by the State,

Reynolds v. United States, 98 U. S. 145, 25 L. 244,
Cooley's Constitutional Limitations, Chap. XIII, cases cited,
Cooley on Taxation, page 197,

in fact the cessation of teaching occurred on the first day of September, 1903, (Tr. p. 5) and so far as these petitioners are concerned it is immaterial whether instruction was continued under the law or in violation of the law. Certainly it could not be objected by the A. B. C. F. M. that there had been a violation of the agreement, when in fact the instruction required by the agreement was still continued.

There is another complete answer to the objection raised by the demurrer. The contract stated in the amended petition is in the alternative. According to the terms of the contract, the Government, upon its failure to continue the required instruction, whether religious or literary and scientific, in the school, became obliged to return the school and the property transferred or at its option to pay to the A. B. C. F. M. or its successors in interest the sum of Fifteen Thousand Dollars. The right of election was therefore in the Government to do the one or the other upon its failure to perform the conditions of the agreement and transfer. This right of election would have to be exercised by the government before suit could be brought by the petitioners and this within a reasonable time after the breach of the condition. After that time the right of election would go to the petitioners. Only upon the election having been completed, could the right of action be said to have accrued. From that time only could the statutory limitation begin to run.

Rewrick v. Goldstone, 48 Cal. 564.
Center v. Center, 38 N. H. 318.
Childs v. Fischer, 62 Ill. 206.
McNitt v. Clark, 7 Johns. (N. Y.) 464.
Mayer v. Dwinell, 29 Vt. 298.
Patchin v. Swift, 21 Vt. 292.

It appears from the petition that the claim of the petitioners was presented to the Government on the first day of September, 1904, and demand made that election should be made by the Government between the alternative liabilities under its agreement. It is alleged further that the Government refused either to reconvey or pay the Fifteen Thousand Dollars. This in itself left it upon the petitioners to elect the liability of the Govern-

ment. If, however, any right of election remained in the latter, it is alleged that it has elected to retain the school and the property. In any case, the liability of the Government became fixed only after its refusal to elect as alleged in the petition. This occurred since September 1, 1904, when the demand was made upon the Government. As the right of action in petitioners accrued only when the liability of the Government became fixed as between the alternative obligation to return the school and property or pay Fifteen Thousand Dollars, it follows that more than two years have not elapsed since the accrual of the action upon which this petition is based.

On the question of impossibility of performance little need be said. The obligation which rests upon the state is purely moral. It cannot be wiped out by one party to the contract making performance impossible by declaring said performance illegal. A moral obligation on the part of the state can no more be escaped by such a process than it can be escaped by an individual. We perceive no reasonable ground upon which this claim is based.

In concluding this argument we remark that we come to the discussion with the single purpose to ask the court to put itself in the situation and into the minds of the parties contracting, remembering that it was the thought of the first half of the nineteenth century, of men whose minds were fired with the missionary spirit, who acted under the compelling conviction that the Bible as read by them was the only rule for human conduct. Nor has this been overlooked by the Supreme Court of Hawaii. So far in the argument they went with us. We ask this court to go one step farther, not only to put itself in the situation and into the minds of the parties and find out what that mind was, but also to construe the language of the instrument in the light thus furnished as it was understood and meant by these parties. If the court will but do this we fear not for our cause, for as has been admitted by the Supreme Court of Hawaii, no reasonable man familiar with this situation and with the minds of the parties, "would have for a moment doubted that some sort of religious instruction would continue indefinitely," in other words, that the indubitable understanding of the parties was

that the work of Lahainaluna would be continued for the great end for which it had been carried on up to this time by teaching religion as held by the Mission to the people of Hawaii.

Wherefore it is submitted that the order of the Supreme Court of Hawaii sustaining the demurrer should be reversed and the demurrer overruled.

Respectfully submitted,

W. R. Castle,

David L. Withington,

W. O. Smith,

A. Lewis, Jr.,

C. H. Olson,

For the Appellants.

APPENDIX.

CHAPTER 129, REVISED LAWS OF HAWAII, 1905.

Sec. 2000. *Jurisdiction, Supreme Court.* The Supreme court shall have exclusive jurisdiction to hear and determine the following matters, and shall determine all questions of fact involved without the intervention of a jury.

First. All claims against the Territory founded upon any statute of the Territory; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the Territory, and all claims which may be referred to it by either house of the legislature; *Provided,* however that no suit shall be maintained, nor shall any process issue against the Territory, based on any contract or any act of any Territorial officer which such officer is not authorized to make or do by the laws of this Territory, nor upon any other cause of action than as herein set forth.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Territory against any person making claim against the Territory under the provisions of this Chapter (L. 1894-5, c. 26, s. 1; C. L. S. 1530).

Sec. 2004. *Limitations on suit.* Every claim against this Territory, cognizable as aforesaid, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary of the senate or the clerk of the house of representatives, as provided by law, within two years after the claim first accrues; *Provided,* that the claims of persons under legal disability shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within one year after the disability has ceased. (L. 1894-5, c. 26, s. 5; C. L. s. 1534.)

Sec. 2005. *Petition.* The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in the legislature, or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such person became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from this Territory, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to this government, and whether a citizen or not, has not in any way voluntarily aided, abetted, or

given encouragement to rebellion against this government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney. (L. 1894-5, c. 26, s. 6; C. L. s. 1535.)

Sec. 2008. *Judgment is final.* The judgments of the Supreme court in all matters brought before it under the provisions of this chapter shall be final.

EXTRACT FROM BINGHAM'S SANDWICH ISLANDS, 1847, PGS. 423-424.

"To carry forward the work with energy, while the field was fairly open, and so inviting, the American Board and the patrons of the mission wisely increased the number and the facilities of the laborers, and enabled them to put in operation new and systematic measures for raising the qualifications of native teachers, and for training up a future native ministry, by means of boarding schools and a missionary seminary, on a broader scale than in the first years of the mission was practicable, while a nation of unlettered heathen were on the hands of a few, to be instructed in almost everything needful for them to know. During the last year of the laborious and prosperous course of Kaahumanu, soon after Governor Adams succeeded Liliha, the mission put into operation a missionary seminary, at Lahainaluna, under the care of the Rev. L. Andrews. This was opened in September, 1831, with twenty-five young men as pupils. The number, in the course of the year, was increased to sixty-seven. .The scholars, many of them, were married, and had to provide lodgings for themselves and their families, to build their own school-houses, with the direction and aid of the teacher, and raise or procure their own food. But such was their laudable desire to obtain the advantage thus offered, that while pursuing their studies they labored patiently, month after month, the first year, to erect, under every disadvantage, the walls and roof of their school-house. The stones they collected without team, and brought their timber from a distance by human muscle. It was all up-hill work—analogous to that which, for years, had been performed, before an enterprise like this, requiring so much of native energy and hearty coöperation, could be successfully undertaken.

"The object of this seminary was to extend and perpetuate the religion of our Lord Jesus Christ, which the mission had labored, eleven years, to introduce, and to aid in accomplishing its design to secure for the nation the blessings of Christianity and civilization, to disseminate sound knowledge throughout the islands, to train and qualify school-teachers for their respective duties, not only by acquainting them with literature and the knowledge of the arts and sciences most needful for them, but with the proper usages and habits of civilized and Christian life, and eventually to educate young men of piety and promising talents to become

preachers of the Gospel, and ministers of Christ, for the maintenance and dissemination of pure religion among their dying fellow men. The intention of the mission was to allow fifty to enter annually who could pass a respectable examination in reading, writing, mental arithmetic, and topographical geography, and whose age did not exeeed twenty-five years. The proportion of pupils from the different islands was 18 from Hawaii, 14 from Maui, Molokai and Lanai; 10 from Oahu, and 8 from Kauai and Niihau. The period for the course in general was four years. The course of studies, introduced gradually, were, for the first year, Arithmetic, Geometry, Trigonometry, Sacred Geography, Hawaiian Grammar, Langauges to a select class.

"Second Year. Mathematics, embracing Algebra, Navigation, and Surveying, History, Languages for a select class.

"Third Year. Mathematics continued, Natural Philosophy, Church History, Languages for a select class.

"Fourth Year. Astronomy, Chemistry, Moral Philosophy, Church History, Languages for a select class.

"During the whole course, more or less attention, every week, is given to biblical instruction, embracing the interpretation of Scripture, evidences of Christianity, Archeology, and Sacred Geography, Composition and Elocution. Systematic Theology was contemplated, as soon as sufficient advancement and preparation for it should be made. Music, vocal and instrumental, Penmanship, Drawing, Maps, Engraving, Printing, Binding, Carpentry, Turnery, and Mason work, all received some attention, at least, from individuals—connected with needful exercise and profitable labor."

EXTRACT, REPORT OF THE MISSION, 1835, BINGHAM, PGS. 470-472:

"The missionaries and their wives and helpers have, up to the present time, endeavored to cherish the schools as a primary means of reforming the nation. They have had classes under their own immediate instruction, amounting sometimes to not less than 1000 individuals of different ages. But the mass of those who have attempted to learn, embracing those numerous collections of people called schools, in the different parts of the islands, have been under the instruction of incompetent native teachers. The aggregate of learners has, at some periods, amounted to 50,000. Probably more than four-fifths of these were advanced to years of maturity, and not a few beyond middle age. Most of them had their ordinary occupations of life to attend to, as though no schools existed.

While it has been our business to teach a few hundred personally, and superintend their efforts to teach others, our steady aim has been to extend a moral and religious influence over the whole community by means of the widely extended and, in some

respects, loose school system. Whatever may have been the defects of that system, it should be understood that the designs of it has not been merely or mainly literary; that mental culture has not been in the common schools, especially of adults, our most prominent object; for in those points of view, hundreds of schools, under native teachers, embracing thousands of readers, would hardly deserve the name of schools, as that term is ordinarily understood in the most enlightened countries as the nurseries of science and literature. But the general object has been to supply, in some measure, the want of family government and education; the want of a well regulated civil government; to restrain from vice and crime, and to supply amply, by a mild and salutary influence, the want of the power once derived from a horrid superstition. It has afforded, to a great extent, by the pen, slate, pencil, and book, a substitute for the pleasure which the people once derived from games of chance, and of skill, and strength, connected with staking property; and in many cases instruction imparted by dictation and the exercise of joint recitation or cantillation of moral lessons by classes, has been a happy substitute for the heathen song and dance, where ignorance of the value of mental culture, or a want of interest in the subject of education, or the incompetency of the teacher, rendered a severer method of application impracticable. When this easier method of communicating and receiving some knowledge of what we desired to teach has served to enlist the stupid pupils at all, they have been ready to try to learn the art of reading and writing where the means have been supplied. And as these have been acquired by numbers, the desire for books and other studies has been increased beyond our ability to meet it.

"While then we have labored to afford the people the means of learning the arts of reading and writing, geography and arithmetic, for the discipline of mind and the purposes of life, and to facilitate their access to the sacred Scripture, it has been our steady aim to bring to bear constantly on the dark hearts of pagans and their children those moral and evangelical truths, without the presence and possession of which the design of their rational existence cannot be secured. While our school system does indeed contemplate the disciplining of the mind, and affords important means and facilities for it, it has always contemplated chiefly a moral influence over the heart and life which the want of family and civil government, and the want of an adequate number of the preachers of the Gospel, has made indispensable. We have, therefore in our first books, inserted such plain precepts in the science of duty as every reader can understand; and have added evangelical tracts and portions of Scripture as reading lessons for all our schools; and have endeavored to give them an influence similar to that of Sabbath schools, as far as circumstances would allow. And we believe their agency has been, and still is, in that respect, far more indispensable than that of Sabbath schools in the United States or Great Britain."

FROM THE DECLARATION OF RIGHTS AND FIRST CONSTITUTION OF HAWAII,

Granted by Kamehameha III, October 8, 1840.

Thurston's Fundamental Law of Hawaii, pp. 1-2.

"God hath made of one blood all nations of men to dwell on the earth," in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands.

These are some of the rights which He has given alike to every man and every chief of correct deportment; life, limb, liberty, freedom from oppression, the earnings of his hands and the productions of his mind, not, however, to those who act in violation of the laws.

God has also established government, and rule for the purpose of peace; .....

CONSTITUTION.

It is our design to regulate our kingdom according to the above principles and thus seek the greatest prosperity both of all the chiefs and all of the people of these Hawaiian Islands. But we are aware that we cannot ourselves alone accomplish such an object—God must be our aid, for it is His province alone to give perfect protection and prosperity. Wherefore we first present our supplication to Him, that he will guide us to right measures and sustain us in our work.

It is therefore our fixed decree,

I. That no law shall be enacted which is at variance with the word of the Lord Jehovah, or at variance with the general spirit of His word. All law of the Islands shall be in consistency with the general spirit of God's laws.

II. All men of every religion shall be protected in worshipping Jehovah, and serving Him, according to their own understanding, but no man shall ever be punished for neglect of God unless he injures his neighbor, or bring evil on the kingdom. .....

FROM STATUTES FOR THE REGULATION OF SCHOOLS.

Chapter 7, Laws 1842, Thurston, pp. 38, 15-41.

The basis on which the kingdom rests is wisdom and knowledge. Peace and tranquility cannot well prevail in the land, unless the people are taught in letters, and in that which constitutes prosperity.

Furthermore, those scholars which attend the Mission Seminary at Lahainaluna, shall be freed from the money tax, and all

public labor of the chiefs, and all scholars that go to school to learn geography, arithmetic, and other higher branches taught in the higher schools, those scholars shall not go to the public labor of the chiefs and land agents till they become eighteen years of age.

FROM THE LAW FOR THE PROTECTION OF THE SABBATH.

Chapter 11, Laws 1842, Thurston, p. 51.

It is a well established fact that a nation cannot enjoy peace nor the people prosper, unless they are taught in morals and religion. Wherefore the Sabbath is of great importance, because on that day the people are extensively taught in those branches. If any one interferes with another in his observance of the day, or if any one disturbs the peace and quiet of the day, he is criminal, he does an injury to the public, and to every individual who is seeking the greatest good. Wherefore it is proper for the laws to give protection to the Sabbath, and to all those who observe the day, lest any one should interfere with the greatest good of the land, by making the day a nullity.

ACT OF JULY 11, 1850, INCORPORATED IN CIVIL CODE.

Civil Code 1859, page 174.

Section 738. Whereas, an arrangement has been made between the Hawaiian Government and the American Board of Commissioners for Foreign Missions, whereby the seminary at Lahainaluna has been ceded to the King's Government, on condition that the Government undertakes its support; and whereas, it is desirable to have some institution, where Hawaiian youth can be properly educated for various occupations, therefore, the arrangement, whereby the seminary of Lahainaluna has been surrendered to the King's Government, is hereby ratified and confirmed, and a reasonable sum shall be appropriated annually out of the public funds, for the support of said seminary, in pursuance of said arrangement.

Section 739. Said seminary shall be under the care and direction of the Board of Education, who shall appoint its teachers, and make rules and regulations, from time to time, for its government, and course of instruction; provided, that such rules and regulations do not conflict with the conditions on which that institution was ceded to the Government, nor with any law of this kingdom. Said Board shall have the care and management of the buildings, premises, apparatus, and all other property belonging to said institution.

Section 740. It shall be the duty of the President of the Board of Education, to include in his report to the Legislature, at each regular session thereof, a statement of the operations and condition of said seminary.

Sections 1, 2, 3 respectively, in Act, July 11, 1850.

(20075).

Office Supreme Court, U. S.
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CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 195.

FREDERICK LOWREY, GEORGE P. CASTLE and W. O. SMITH, TRUSTEES,
Appellants,

vs.

THE TERRITORY OF HAWAII,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR RESPONDENT.

E. C. PETERS,
Attorney General, Territory of Hawaii;

M. F. PROSSER,
First Deputy Attorney-General, Territory of Hawaii,
For Respondent.

HONOLULU:
HAWAIIAN GAZETTE CO., LTD.
1906

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

RESPONDENT'S BRIEF.

STATEMENT OF THE CASE.

This matter comes before this Court on appeal from the final judgment of the Supreme Court of the Territory of Hawaii, dated the 3rd day of January, A. D. 1906, sustaining the demurrer of respondent to petitioner's petition and dismissing said petition.

The facts as appear by the record are, briefly, as follows:

The American Board of Commissioners of Foreign Missions,

in the year 1835 made an application to have the land upon which Lahainaluna Seminary was established awarded to it by the Board of Commissioners to Quiet Land Titles; such application was thereafter withdrawn for reasons which appear on page 2 of the record, as follows: "Lahainaluna, Part 2, Sec-"tion V. *Claim relinquished before the land commission in "consequence of and after arrangement having been entered into "by the Hawaiian government with the Mission," and upon the* final confirmation of the title of the American Board of Commissioners of Foreign Missions to property located on the Island of Maui, that portion claimed as part 5, Section 2, being the premises upon which the Lahainaluna Seminary stood, was expressly excepted from the award.

On the 25th day of April, 1849, the American Board of Commissioners of Foreign Missions, through its representatives in Hawaii, offered to transfer said seminary to the Hawaiian government (it having prior to that date been supported by said American Board as a mission school) upon the following conditions:

First: "That the said Hawaiian Government agrees that the said institution shall be continued at its expense as an institution for the cultivation of sound literature and solid science, and"

Second: "That it shall not teach or allow to be taught any religious tenet or doctrine contrary to that heretofore inculcated by the mission which we represent, a summary of which will be found in the Confession of Faith herewith enclosed. And that in case of the non-fulfillment or violation of the conditions upon which this transfer is made by the said Government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises and all the rights and privileges hereby conveyed or transferred to the Hawaiian Government, by the said Island Mission, shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions." (Trans. p. 10.)

This offer as made was not accepted by the Government, but it instead submitted a counter offer to the Mission by which it offered to take over the school on the conditions made in the Mission's original offer, but "provided that in case of the non-fulfillment on the part of this Government of the conditions specified in the letter of the above named gentlemen, it shall be optional with this Government to allow the Institution, with all additions and improvements, which may have been made upon the premises, and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions or to pay the sum of $15,000. Provided also, that in case this Government shall find it expedient to divert this establishment to other purposes, than those of education, it shall be at liberty to do so, on condition, that it sustain an institution of like character, and on similar principles in some other place on the Island, or pay the sum of $15,000 to said Mission, in behalf of the Mission Board in Boston." Which counter offer was accepted by the prudential committee of the American Board of Commissioners for Foreign Missions in the month of March, 1850. (Trans. p. 16.)

This offer to transfer the Lahainaluna Seminary or school to the Hawaiian Government amended as hereinbefore set forth was duly accepted by the Privy Council of the Kingdom of Hawaii subject to the ratification of the Legislature on the 26th day of April, 1849. (Trans. p. 12.) The Confession of Faith hereinbefore referred to is set forth at length on page 15 of the Transcript. The Legislature of Hawaii ratified the action of the Privy Council of April 26th, 1849, (Trans. p. 3), in the following manner:

Civil Code 1859, Sections 738, 739: "Whereas, an arrangement has been made between the Hawaiian government and the American Board of Commissioners of Foreign Missions whereby the seminary of Lahainaluna has been ceded to the King's government *on condition that the government undertake its support, and whereas it is desirable to have some institution where Hawaiian youth can be properly educated for various*

occupations, therefor the instrument whereby the seminary of Lahainaluna has been surrendered to the King's government is hereby ratified and confirmed and a reasonable sum shall be appropriated annually out of the public funds for the support of said seminary in pursuance of said arrangement.

"Section 739. Said Seminary shall be under the care and direction of the Board of Education, who shall appoint its teachers and make rules and regulations from time to time for its government and course of instruction, *provided that such rules and regulations do not conflict with the conditions on which that institution was ceded to the government, nor with any law of this kingdom.* Said Board shall have the care and management of the buildings, premises, apparatus and all property belonging to said institution."

No deed of conveyance was ever executed and such agreements as exist between the parties are represented by the offer and qualified acceptance hereinabove referred to and the act of the Legislature of the Kingdom of Hawaii above quoted. It is contended by the appellants herein that both of the conditions upon which the transfer was made by the American Board to the Kingdom of Hawaii have been broken and that the American Board, by reason of such breach, is entitled at this time to recover the premises conveyed, or to receive from the Territory of Hawaii the sum of $15,000.00, pursuant to the terms of the contract between the parties. (Trans. p. 3.) The only question before this court is whether or not the pleadings filed herein show any breach of a condition which would entitle the appellants to the relief prayed for in the complaint.

BRIEF OF THE ARGUMENT.

I.

SUCH CONDITIONS AS WERE ATTACHED TO THE TRANSFER OF LAHAINALUNA SEMINARY WERE CONDITIONS SUBSEQUENT.

CONDITIONS SUBSEQUENT ARE STRICTLY CONSTRUED AS AGAINST THE GRANTOR AND NOTHING WILL BE TAKEN BY WAY OF INTENDMENT IN FAVOR OF THE GRANTOR.

"Conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates; and the rigorous exaction of them is a species *summum jus,* and in many cases hardly reconcilable with conscience. If the condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, either by the act of God, or of the law, or of the grantor; or if it be impossible at the time of making it, or against law, the estate of the grantee, being once vested, is not thereby devested, but becomes absolute."

4 Kent's Comp. p. 138.

Woodworth v. Payne, 74 N. Y. Rep. 196-199.

This was a case of a grant of certain property for church purposes upon the condition that the seats therein should be forever free for the use of any and all persons and if the seats in said church should be rented or sold, then the premises should revert to the grantor. The church in question, together with the seats therein contained, was sold, the conveyance containing the same restrictions relative to the use of the premises and the seats in the church, as was contained in the original grant. A forfeiture was claimed for the reason that the sale of the church property carried with it the sale of the seats therein, and therefore the condition of the grant was broken.

"Miller, J. Conditions in grants are not favored in law, and hence they must be clearly expressed. *(Craig v. Wells,* 11 N. Y. 315.) They are also to be construed with great strictness,

because they tend to destroy estates; and the rigorous exaction of them is a species of *summum jus,* and in many cases hardly reconcilable with conscience. (4 Kent's Com. 130.) Nor are they to be sustained by inference or recital."

Mills v. Evansville Seminary, 58 Wis. 136-139.

In the case above quoted, a forfeiture was claimed for breach of condition, the property in question having been conveyed upon the express condition "that the premises thereby agreed to be conveyed to the defendant corporation were to be used for a site for seminary grounds and buildings only, and that the title should revert to the plaintiff when they ceased to be used for such purposes." The evidence in the case showed that the grounds and buildings had been in fact abandoned by the defendant for seminary purposes for a considerable period of time, but that shortly prior to the commencement of the action, such use had been recommenced.

"It appears that in December, 1875, the trustees of the seminary called a meeting of the legal voters of the corporation, to be held on the 6th of January, 1876, to take into consideration what should be done with the seminary property. At this meeting in January, which was attended by only a minority of the voters, a resolution was adopted which stated in substance that the seminary had been abandoned as an institution of learning, and all efforts to induce any other denomination to accept the property and endow and maintain a school there had failed; that as the property in its unprotected condition would soon run down and become worthless, the board of trustees was empowered and directed to deed the seminary property to a corporation recently organized in the village, known as the Evansville Boot & Shoe Company. Mr. Mills was present at this meeting and voted against the resolution, and we think, it appears that he always resisted that disposition of the property. Still, the Evansville Seminary, by its officers, deeded the property January 19, 1876, to the Evansville Boot & Shoe Company. Before this deed was executed the plaintiffs made a written demand for the Evansville Seminary to surrender to them the 'Seminary Park' as reversionary owners.

But though the property was conveyed to the Boot and Shoe Company, the corporation never took possession of it or assumed to control it, the possession practically remaining all the while in the seminary corporation. On the 22d of December, 1879, the Boot and Shoe Company reconveyed the property to the defendant corporation.

"It is elementary law that such conditions are most strongly construed against the grantor, and that a forfeiture will not be enforced unless clearly established. It is doubtless true, as claimed by defendants' counsel, that courts do not hasten to seize upon mistake or neglect, or even misuser of property, to adjudge a forfeiture in cases of this nature.

"The failure to maintain a school in the building for a considerable period, it appears, resulted from causes which the trustees could not well overcome or control, and ought not to work a forfeiture."

"It is a general rule, that such conditions annexed to estates as go in defeasance and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases."

Voris v. Renshaw, 49 Ill. 431.

"Clear Proof of Forfeiture.—A condition cannot be extended beyond its terms, and a party who insists upon a forfeiture of an estate for a breach of a condition must bring himself clearly within the terms of the condition."

2 Devlin on Deeds, Sec. 973.

"When a grantor of land seeks to re-enter for breach of a condition subsequent he should be required to establish something more than a technical encroachment through the action of strangers without the grantee's permission. It is not enough to show in this way that the letter of the condition is violated, *but it must appear that its true spirit and purpose have been wilfully disregarded by the grantee.*"

Rose v. Hawley, 141 N. Y. 378.

II.

IT DOES NOT APPEAR BY THE RECORD THAT ANY OF THE CONDITIONS OF THE TRANSFER HAVE BEEN BROKEN.

The condition that "it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission which we represent, a summary of which will be found in the Confession of Faith herewith enclosed" certainly is not shown to be broken by the pleadings; it would require an allegation that religious doctrines *contrary* to the adopted creed were taught. In no other way could a breach of the foregoing condition be shown.

This leaves the question whether the agreement to teach sound literature and solid science was broken by failure to teach those branches of learning otherwise than they would require to be taught in a technical school and school of agriculture. The averment in the petition of the fact that the "cultivation of sound literature and solid science has also ceased" would raise an issue of fact to be tried on evidence were it not modified, and necessarily controlled, by the additional averment that "the institution has become a technical school under the name of the Lahainaluna Agricultural School." By the rule that at common law pleadings are construed, as far as they reasonably may be, against the pleader, the additional averment must be taken to be an admission that the usual technical training is now given at the school in the science of agriculture, so that it becomes a question of law whether such training eliminates, as contended by the plaintiffs, or, on the other hand, includes instruction in sound literature and solid science. An agreement to teach solid science is not violated, but is observed, by teaching applied science relating to agriculture. The science of agriculture cannot be taught without imparting at the same time instruction in the literature relating to the science. It is not apparent why such literature, so taught, is not as sound or as valuable as are literary studies undertaken by themselves, or that the agreement is broken by teaching solely that literature which is limited by the study of science.

III.

THE TRANSFER AS RATIFIED BY THE LEGISLATURE WAS UPON THE CONDITIONS SET FORTH IN SECTIONS 738-739 OF THE CIVIL CODE OF 1859 HEREINBEFORE SET FORTH IN FULL.

The wording of the statute above referred to, "Whereas, it is desirable to have some institution where Hawaiian youth can be properly educated *for various occupations, therefore* the arrangement * * * is hereby ratified and confirmed," shows clearly that in the mind of the Legislature the school was to be used for the purpose of educating Hawaiian youths *in various occupations* and was not to be confined to the instruction then given.

By Section 739 the care and control of the institution is placed in the Board of Education which is given power to make rules and regulations which *"do not conflict with the conditions upon which the institution was ceded to the government nor with any law of this Kingdom."*

IV.

Upon the overthrow of the Monarchy in the year 1894, the property in question together with other public property was taken over by the Provisional Government of Hawaii and thereafter upon the establishment of the Republic became a part of the public domain subject to such conditions and restrictions as were imposed by law, not contrary to the provisions of the Constitution of the Republic.

Article 92 of the Constitution provides as follows:

Section 1. "All Statutes and enactments in force in the "Hawaiian Islands at the time this Constitution takes effect "not inconsistent therewith, and all rights, actions, prosecutions, "judgments and contracts then existing and valid, shall continue "as if this Constitution had not been adopted unless the same "are inconsistent with this Constitution, or are herein specifically abrogated, or are otherwise herein provided for."

By Article 97 of the same constitution it is provided that "From and after December 31st, 1895, no public money shall "be appropriated * * * for the support or benefit of any "sectarian denominational or private school or any school not "under the exclusive control of the Government," which provision was re-enacted as a part of the Organic Act of the Territory of Hawaii in Sec. 55 thereof.

Under the foregoing provisions of the constitution, Lahainaluna Seminary could no longer exist as a sectarian or denominational school and if any breach of the original conditions of the transfer has been made, such breach is the result of the laws enacted by the Republic of Hawaii and the Congress of the United States which made compliance with such conditions impossible.

Constitution of the Republic, Sec. 97 *supra.*

Organic Act, Sec. 55.

WHEN THE PERFORMANCE OF CONDITIONS SUBSEQUENT IS PREVENTED BY THE ACT OF GOD OR BECOMES CONTRARY TO LAW BY REASON OF THE TRANSFER OF THE TERRITORY OR CHANGE OF GOVERNMENT FAILURE TO FULFIL SUCH CONDITIONS WILL NOT WORK A FORFEITURE OF THE ESTATE.

The force of conditions subsequent as applied to public grants, was discussed by the United States Supreme Court in the case of the *United States v. Arredondo et al.*, reported in 6 Peters, at page 745. The question there before the court was as to a condition subsequent which required that 200 Spanish families should be placed upon certain property granted by the Kingdom of Spain to Spanish settlers shortly prior to the annexation of Florida to the United States of America. The condition subsequent, to-wit, that 200 Spanish families should be placed on the lands granted became impossible of performance by reason of the annexation of Florida to the United States of America,

the territory granted becoming subject to laws and conditions not existing at the time of the original grant.

Baldwin, J., delivered the opinion of the Court.

"We are not prepared to say that the condition of settling two hundred Spanish families on an American Territory has been, or is possible; the condition was not unreasonable or unjust at the time it was imposed, its performance would probably have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States would be demanding the *summum jus* indeed, and enforcing a forfeiture on principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves at all events justified, if not compelled, to declare that the performance of this condition had become impossible by the act of the grantors; the transfer of the territory, the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not submitted this case to her highest court of equity on such grounds as these; we are not either authorized or required by the law which has devolved upon us the final consideration of this case to be guided by such rules or governed by such principles in deciding on the validity of the claimant's title. Though we should even doubt, if sitting as a court of common law and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity; according to its established rules our decree must be in conformity with the principles of justice, which would in such a case as this not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

Scoville v. McMahon, 62 Conn. 378;

Wheeler v. Moody, 9 Tex. 371-376.

It is respectfully submitted in conclusion that the appellants are attempting to enforce a forfeiture herein on grounds which

are clearly inequitable and cannot appeal to the conscience of the court.

The creed, for failure to teach which a forfeiture is claimed, is no longer taught or permitted to be taught by the denomination prescribing it, and the school established by the American Board as Lahainaluna Seminary is continued today along the same lines as originally established, with such improvements and changes as experience, time and changed conditions have required, and made necessary and desirable.

It is respectfully submitted that the appeal of Appellants should be dismissed and that the judgment of the Supreme Court of Hawaii should be affirmed.

E. C. PETERS,
Attorney General, Territory of Hawaii.

M. F. PROSSER,
First Deputy Attorney General, Territory of Hawaii,
For Respondent.

Supreme Court of the United States.

No. 195.—October Term, 1906.

Frederick J. Lowrey, George P. Castle, and William O. Smith, Trustees, Appellants, *vs.* The Territory of Hawaii.	Appeal from the Supreme Court of the Territory of Hawaii.

[May 13, 1907.]

This action was brought in the Supreme Court of the Territory of Hawaii to recover from the Territory the sum of $15,000 as the alternative of the reconveyance of certain property conveyed by the American Board of Commissioners of Foreign Missions in 1849 to the Hawaiian government, for the nonfulfillment of the conditions upon which the property was conveyed. A demurrer was sustained to the petition and thereupon this appeal was taken.

The following is an outline of the principal facts alleged:

The American Board of Commissioners for Foreign Missions, hereinafter called the American Board, for many years prior to 1850 had conducted and maintained a Protestant Mission in the Hawaiian Islands, and as an essential part of its missionary work carried on many schools. Its most notable educational work was centered in a school established in 1831 at Lahainaluna, on the Island of Maui, where it possessed a large tract of land. This school and the premises occupied by it were set off by the chiefs to the Protestant Mission in 1835. On the buildings and other improvements many thousands of dollars were expended, and the school had, in 1850, become a most important factor in the life and progress of the Hawaiian people, and was recognized as the leading educational institution in the kingdom.

The course of instruction comprised not only the usual topics belonging to secular learning, but included also direct religious teaching and training in the doctrines represented by the Mission.*

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* Laws of the High School, as Amended and Adopted by the Mission June, 1835.

Chapter I.

Design of the School.

The design of the High School is,

1. To aid the Mission in accomplishing the great work for which they were sent hither; that is, to introduce and perpetuate the religion of our Lord and Saviour Jesus Christ, with all its accompanying blessings, civil, literary and religious.

4. Another object still more definite and of equal or greater importance, is, to

These facts were established before the board of commissioners to quiet land titles to which the claim of the American Board to Lahainaluna, as an established part of its system, was duly presented and recognized, and the board of commissioners adjudged as follows: "Lahainaluna, part 5, section 2, claim relinquished before the land commission in consequence of an after-arrangement having been entered into with the Hawaiian government by the Mission. Vol. 3. L. C. Award, p. 143 *et seq.*, upon the final confirmation which was duly made to the said A. B. C. F. M. all the lands claimed were awarded, 'with the exception of section 2, Lahainaluna, which had been withdrawn.'"

The "after-arrangement" referred to in the records of the land commission was as follows:

"Because of financial stress, and also feeling that the school, which had really become a national institution, should be conducted by the government at its own expense, in April, 1849, the Mission, at its general mission held at Honolulu, voted as follows: 'To make over this seminary to the government, it being understood that it is to be conducted on the same principles as heretofore.'

"An offer was thereupon made to the government in pursuance to this vote of the Mission to make over the school to the government on condition that it should be continued at its expense as an institution for the cultivation of sound literature and solid science, and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, a summary of which will be found in the confession of faith herewith enclosed, and that in case of the non-fulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions of improvements, should revert to the said Mission.'"

This offer as made was not accepted by the government, but it instead submitted a counter offer to the Mission, by which it offered to take over

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educate young men of piety and promising talents, with a view to their becoming assistant teachers of religion, or fellow laborers with us in disseminating the gospel of Jesus Christ to their dying fellow men.

Chapter VII.

Of the Studies of the School.

4. The whole school shall meet between daylight and sunrise each week day for prayer, at which one of the instructors shall preside; the roll shall be called, absentees marked and called to an account at least once a week.

6. On the afternoons of Tuesdays and Thursdays each week, or at other times equivalent, the whole school shall meet for biblical instruction, embracing the interpretation of Scripture, evidence of Christianity, archeology and sacred geography. And Friday afternoon of each week or time equivalent shall be spent in exhibiting and correcting compositions in the Hawaiian language and in elocution

the school on the conditions made in the Mission's original offer, but "provided that in case of the non-fulfillment on the part of this government of the conditions specified in the letter of the above-named gentlemen, it shall be optional with this government to allow the institution, with all additions and improvements which may have been made upon the premises and all rights and privileges connected therewith, to revert to the said Mission, to be held in behalf of the American Board of Commissioners for Foreign Missions, or to pay the sum of $15,000; provided also that in case this government shall find it expedient to divert this establishment to other purposes than those of education it shall be at liberty to do so, on condition that it sustain an institution of like character and on similar principles in some other place on the island or pay the sum of $15,000 to said Mission in behalf of the Mission Board in Boston."

A more definite form of the "confession of faith" was substituted and accepted by the Government, and the whole arrangement ratified by the Hawaiian legislature, Law of 1850, (F. C. 1850) 158, sec. 1 of Civil Code (1859,) sec. 783, and by the prudential committee of the American Board.

The letter of the Mission to the Minister of Public Instruction is inserted in the margin.*

The Hawaiian government at once took possession of the Lahainaluna Seminary and carried on the school exactly as it had been conducted by

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* Exhibit A.

HONOLULU, April 25, 1849.

To His Ex. R. Armstrong, Minister of Public Instruction of the Hawaiian Islands.

Sir: The undersigned, a committee of the general meeting of the Mission of the A. B. C. F. M., at the Sandwich Islands, appointed in reference to the Mission Seminary at Lahainaluna, Maui, beg leave through your Excellency to offer a few remarks respecting that institution, and make some proposals in reference to it to His Majesty's Government for its consideration.

It is well known to His Majesty and also to most of the members of his government that in the year 1831, the mission commenced the establishment of the institution now known as the Mission Seminary of Lahainaluna, Maui, to promote the diffusion of enlightened literature and Christianity throughout the islands.

From that period to the present time this institution has been unceasingly and anxiously watched over, cherished and cared for by the Mission. No expense or pains coming within its appropriate means or power have been spared to promote its usefulness and secure the objects of its establishment.

Three missionaries have for a large portion of the time been devoted to its interests, and two at all times since the two or three first years of its existence. About $77,000.00 have been expended for its benefit, including the support of the teachers and the dwellings erected for their accommodation.

We need not point you to the fruits of this cherished institution, scattered throughout the islands, filling various posts of honor, responsibility and usefulness,

the Mission, both in religious instruction and the inculcation of sound literature and solid science.

For many years after the government had taken over the school the principals of the school continued their relations as missionaries of the American Board in their work in the school, and continued to make reports of their educational and religious work and instruction in the school to the general meetings of the Mission.

In 1862 the seminary buildings were burned down. Other buildings were built. The principal, in his report for that year, 1862–3, reviewing the history of the school, says: "The Hawaiian government has always been a liberal friend and benefactor. . . . Never in any way have

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both in and out of the government. They are well known to His Majesty, and the officers of his government, and to none better than yourself.

The institution has been planted and sustained to the present time by the American Board of Commissioners of Foreign Missions, from donations given by the American churches for the spread of the gospel in heathen lands. That board, as we learn by recent intelligence, was at the close of its last financial year embarrassed by a debt of $60,000.00, incurred in the prosecution of its labors of benevolence and mercy.

As a consequence of its indebtedness, it has been obliged to curtail its expenditures by diminishing its grants to each one of the missions under its care, and this Mission, in common with others, has shared in the general reduction.

For this reason the Mission will be unable to carry forward its operations with the vigor to be desired in all of its departments of labor. Some must almost inevitably suffer for want of pecuniary means.

In view of these facts, and believing that under present circumstances the transfer of this institution to the fostering care and patronage of Government will promote the highest interests of the Hawaiian people, we beg leave through your Excellency to submit to His Majesty's government for its consideration the following proposals, viz:

That the Mission of the A. B. C. F. M. at the Sandwich Islands, acting for and in behalf of the said American Board of Commissioners of Foreign Missions, having its headquarters in Boston, State of Massachusetts, in the United States of America, relinquish all of their right, title and interest to and in the seminary buildings located at Lahainaluna on the island of Maui, and known as the Mission Seminary, together with all of the dwelling houses at that station erected by the Mission at the expense of the said A. B. C. F. M., for the use of the teachers in the said Mission Seminary; also the building erected by the mission as a printing office and bindery; also all lands pertaining to and granted for the use of the Missionary Seminary, and also all philosophical and other apparatus procured for the use of the said seminary, also the public library of the said institution, and to transfer the same to the Hawaiian Government for its use, benefit and behoof to have and to hold the same forever.

Providing, however, and this transfer is made upon the express condition that the said Hawaiian Government agrees that the said institution shall be continued at its expense, as an institution for the cultivation of sound literature and solid

they interfered with our manner of instruction, or in the course of instructions pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who, under the religious instruction at the school, became ministers, he says: "While six who were connected with it since it has been under the care of the Hawaiian government have been ordained to the same office."

Prior to the establishment of the Anglican Church in Hawaii the board of education appointed as instructors such persons as were acceptable to the Mission, generally selecting those nominated by the Mission. When the Anglican Mission was established it was proposed that the forms and

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science; and, further, that it shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the Mission, which we represent, a summary of which will be found in the confession of faith herewith enclosed, and in that in case of the non-fulfillment or violation of the conditions upon which this transfer is made by the said government, the whole property hereby transferred, hereinbefore specified, together with any additions or improvements which may have been made upon the premises, and all the right and privileges hereby conveyed or transferred to the Hawaiian Government by the said Island Mission shall revert to the said Mission, to have and to hold the same for and in behalf of the American Board of Commissioners of Foreign Missions.

These proposals, if accepted, by the Hawaiian Government, shall not have binding force until they shall have received the sanction of the Prudential Committee of the American Board Commissioners of Foreign Missions in Boston; and further, should the said Hawaiian Government accept the proposals here presented, and enter forthwith upon the fulfillment of the conditions, and should the said transfer not meet the approbation of the Prudential Committee, the Mission, on its part, pledges itself to refund to the said Government any necessary expenses it may have occurred in carrying on the institution whilst the parties were awaiting the ratification or rejection of this transfer by the said Prudential Committee. Provided, however, that moneys shall not have been expended in enlargement or improvements, other than what may have been actually necessary to keep the buildings in repair and carry on the institution.

In case of disagreement of the parties as to the amount proper to be refunded, in case of the non-ratification of this conveyance by the Prudential Committee, the sum shall be determined by two arbitrators, one of which shall be chosen by each of the respective parties, and which arbitrators in case of disagreement shall elect a third to decide upon the award.

The foregoing remarks and proposals are respectfully submitted for the consideration of His Majesty's Goverument, and I feel greatly obliged by an early answer.

We have the honor to be,

Very respectfully, your ex. friends and most obedient servants,

W. P. ALEXANDER,
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probably the substance of religious instruction should be changed, and advice was asked of the Attorney General. His reply reviewed the whole arrangement upon which the government received the seminary, and concluded as follows: "Should the government not be willing to keep the conditions as far as I have shown, then the property and improvements must be restored to the A. B. C. F. M."

In 1865 the Hawaiian Gazette, the official mouthpiece of the government, declared that the government had resolved that its support should be given to schools irrespective of their religious teaching, but pointed out that the board of education might be chargeable with partiality for supporting a state church, inasmuch as it paid large sums to defray the expenses of Lahainaluna, where the principles and theology of one particular sect were exclusively taught, although opposed to the belief of all in communion with Roman Catholic and Episcopal Churches.

In the following years, upon the suggestion by the Mission of certain instructors, a correspondence arose between the board of education and the Mission, in which the board of education said that it was understood that the institution was to be continued so as to aid instead of to defeat the purpose for which it had been founded, and that nothing had been done to justify the intimation that the board had any desire to defeat such purpose, and admitted "that a full compliance with agreement consists in appointing persons teaching in the doctrine and after the manner of the Congregational and Presbyterian Churches of the United States." And further: "The board are fully aware that if they do not see fit to carry on the institution according to the terms of the contract, they have to reconvey it, or pay the sum of $15,000."

After 1865 the seminary continued to be conducted on the same lines as prior thereto.

In 1894, in the constitution of the Republic of Hawaii, it was provided that ". . . No public money shall be appropriated . . . for the support of (or?) benefit of any sectarian, denominational or private school." This provision is continued and remains in full force as a part of section 55 of the organic act.

Religious instruction ceased to be a part of the curriculum at Lahainaluna, as provided in the agreement, on or about September 1, 1903, at which date the religious tenents and doctrines, in accordance with the creed and articles of faith of the Mission, ceased to be taught, and are no longer taught. The "cultivation of sound literature and solid science" has also ceased, and the institution has become a technical school under the name of "The Lahainaluna Agricultural School."

The Territory maintains no other institution of like character and on similar principles in any other place on the island.

The appellants are the successors of the American Board of Commissioners for Foreign Missions.

Upon these facts, it is alleged, that appellants have become entitled to a return of the property conveyed or to the payment of $15,000; that the Territory has refused to do either, but has elected to retain the property, which election is evidenced by its refusal to pay the said sum, and the further fact that it is proceeding to erect expensive buildings thereon and expend large sums of money to fitting the property and the school to become a technical school, namely, an agricultural college.

The petition was demurred to upon grounds substantially as follows:

1. That the court had no jurisdiction of the subject matter of the claim. 2. That the United States was a necessary party, the property described in the petition having been transferred and ceded to the United States by the treaty of annexation of July 7, 1898. 3. That the petition did not set out facts sufficient to constitute a cause of action in that, (*a*) it did not appear that the agreement set forth in the petition was ratified by the legislature; (*b*) that the right of action accrued more than two years prior to the commencement of the action; (*c*) it did not appear that there had been a breach of the conditions of the agreement; (*d*) or if so, that it occurred in compliance with law and statutes which rendered the fulfillment of the conditions impossible. 4. That the petition was indefinite and uncertain, in that the allegations as to breach of conditions pleaded were conclusions of law, it nowhere appearing in the petition in what respect the conditions had been broken. The Supreme Court overruled the first, second and fourth grounds, and divisions *a* and *b* of the third ground of demurrer.

Mr. Justice McKenna delivered the opinion of the Court.

The contentions of the parties are sharply in opposition as to the agreement and the necessity and competency of extrinsic evidence to explain it. Appellee contends that we are confined to the letter of the agreement, and so confined its conditions have been fulfilled. In other words, that "sound literature and solid science" are still cultivated, and that no religious tenet or doctrine contrary to those heretofore inculcated by the Mission is taught. Or, to express the contention in language other than that of the agreement, that a school devoted to one subject of secular science and which excludes all religious teaching was contemplated by or is permitted by the agreement. Opposing these views, appellants contend that a mere technical school does not fulfill the agreement; that the terms of the agreement require the "inculcation of general learning and knowledge," accompanied with religious instruction in accordance with the confession of faith submitted to the Hawaiian government. And, it is insisted, that

if there is anything doubtful in the agreement, it may be interpreted by the circumstances which preceded it and the immediate and long-continued practice under it. If we may resort to those circumstances and that practice there cannot be a shade of doubt as to the intention of the parties. It is insisted, however, by the appellee that the agreement is clear and unambiguous and that it does not present a case for the resort to extrinsic evidence. We cannot concur with this view. There is quite a range of meaning in the words "sound literature and solid science." To interpret or specialize them and make definite application of them would certainly receive aid from the practice of the parties. It is contended by appellant that there was a close connection between them and the "definite system of doctrine" which was the "central purpose of the Mission." We, however, need not dwell further upon this contention, though a plausible argument has been advanced to sustain it, and we pass to the next controverted contention. The words of the agreement are that the government "shall not teach or allow to be taught any religious tenet or doctrine contrary to those heretofore inculcated by the mission, a summary of which will be found in the confession of faith herewith enclosed . . ." Were these words all there was of prohibition and purpose as to religion? May we believe that it became suddenly the purpose to change an institution which had had its impulse and foundation in religious zeal to convert the Hawaiians to Christianity and to educate young men to be "teachers of religion," to one simply literary and scientific and nonsectarian? Had the belief of the Mission in its form of Christian faith become so indifferent that it would transfer a seminary instituted for the propagation of that faith with no other condition than that contrary tenets should not be taught? There is not a syllable in this record to justify such assumptions. It must be remembered that we are considering a transaction which occurred in the Hawaiian Islands in 1849, and by the conditions of that time were the acts of the parties induced. Besides, the agreement is not in a formally executed paper. It is found in a correspondence, and is constituted and explained by the whole of the correspondence. And taking the whole of it, there is very little aid from extrinsic evidence needed to demonstrate its meaning and purpose.

The Mission reminds the Minister of Public Instruction that the seminary was established in 1831, "to promote the diffusion of enlightened literature and Christianity throughout the islands," and that it had been unceasingly watched over, cherished and cared for by the Mission, and that $77,000 had been expended for its benefit. It was stated that in consequence of debts incurred "in the prosecution of its labors of benevolence and mercy" the American Board of Commissioners of Foreign Missions was compelled to diminish its grants to each of the Missions under its care, including the

Hawaiian mission, and that the latter for that reason would be "unable to carry forward its operations with the vigor to be desired in all of its departments of labor." In view of these facts, it was stated and believed that under the circumstances the transfer of the institution "to the fostering care and patronage of the government" would "promote the highest interest of the Hawaiian people." An offer was then made to transfer the seminary with the conditions which we have referred to. A confession of faith was enclosed. The government modified the proposal by reserving the right to pay $15,000, as an alternative to the reversion of the property to the Mission if the government should not fulfill the conditions of the grant. The modification was accepted, and in a subsequent communication a new confession of faith was substituted to that originally proposed. The following are the reasons which were given:

"The reasons for requesting the substitution are, that the previously presented confession, although according in all its specified doctrines with our belief and with that also of the churches by whom that institution has been founded and sustained, is yet not so distinctive, as to present a barrier to the introduction there, of other deleterious doctrine not specified in said confession. It will admit, also, of teachings of this Mission and of the churches sustaining it, such as we feel to be entirely subversive of evangelical Christianity. Not doubting, but that these reasons will commend themselves to the members of His Majesty's Government, we beg leave to express in presenting them the high consideration with which we remain."

The correspondence concerned the transfer of a school established in 1835, the design of which was to perpetuate the Christian religion, and with an object described to be "still more definite and of equal or greater importance," that is, "to educate young men to be Christian ministers.' A religious instruction was prescribed. All this the government was informed of when the proposition was made to transfer the school to its "fostering care and patronage." And the government accepted the grant, accepted as it was tendered, and necessarily for the purpose it was tendered.

Even if we stopped here, conviction of the justness of that conclusion is almost indisputable. It becomes indisputable if extrinsic evidence be considered, and we have no doubt that it may be. In *Bradley* v. *W. A. & G. Packet Co.*, 13 Pet. 89, a contract expressed in a correspondence between the parties for the hire of a steamboat, an exception was engrafted which was not expressed, upon evidence that the owner of the boat knew the service for which it was intended, and that when navigation was obstructed by ice another mode of transportation was resorted to. The court said, as to extrinsic evidence it was applied in some cases "to ascertain the identity of the subject; in others its extent. In some, to ascertain the meaning of a term, where it had acquired by use

a broad meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all the purpose was the same. To ascertain by this medium of proof the intention of the parties, where without the aid of such evidence that could not be done, so as to give a just interpretation to the contract." And it was expressed "as the just result" of the cases, "that in giving effect to a written contract, by applying it to its proper subject matter, extrinsic evidence may be admitted to prove the circumstances under which it was made; whenever without the aid of such evidence, such application could not be made in the particular case." In *Brooklyn Life Insurance Co.* v. *Dutcher*, 95 U. S. 269, it was said: "There is no surer way to find out what parties meant than to see what they have done." So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires. See, for further illustration, the following: *Reid* v. *Merchants' Mutual Insurance Co.*, 95 U. S. 23; *District of Columbia* v. *Gallagher*, 124 U. S. 505; *Topliff* v. *Topliff*, 122 U. S. 121; *Paige* v. *Banks*, 13 Wall. 608; *Philadelphia R. R. Co.* v. *Trimble*, 10 Wall. 367; *Chicago* v. *Sheldon*, 9 Wall. 50; *Carazoo* v. *Travano*, 6 Wall. 733; *Simpson* v. *United States*, 198 U. S. 397, 399; *Chicago Great Western Railway Co.* v. *Northern Pacific Railway Co.*, 101 Fed. 792. And many State cases could be cited.

The design of studies for the school we have detailed. The government recognized and continued both without question or change in any way. The seminary buildings were burned down in 1862. The government rebuilt them and continued the school. The petition alleges that the principal of the school in 1862–3 in his report said: "The Hawaiian government has always been a liberal friend and benefactor . . . Never in any way have they interfered with our manner of instruction or in the course of instruction pursued. In our work we have had all the freedom which we possibly could have had under the A. B. C. F. M." Also, referring to pupils who, under the religious instruction at the school, became ministers, he says: "While six who were connected with it since it has been under the care of the Hawaiian government have been ordained to the same office."

In 1864 new interests appeared and a change in the purpose of the school commenced to be urged. It was met by an adverse opinion of the Attorney General, who pointed out the conditions of the transfer and the condition of their non-fulfillment to be the restoration of the property to the A. B. C. F. M. And, again, in 1865 the board of education, while denying the right of the Mission to nominate instructors, conceded the obligation to continue the institution, "so as to aid, instead of defeating, the purpose for which it was founded," and the alternative to be the surrender of the property or the payment of $15,000. "Religious instruction," it is alleged, "upon the lines formerly pursued by the Mission and subsequently by the government, in accordance with the agreement, was continued up to or about September 1, 1903." We hence see that not only the immediate practice of the government construed the agreement as contended for by appellants, but the practice of over fifty years proclaimed the same meaning—proclaimed it without question and against a suggestion and agitation to reject it. It is somewhat staggering to be told that such continuity of practice is not a legal interpreter of the meaning of the parties and that the only criterion can be a precise and isolated form of words which, at the end of a half a century of contrary admission and declaration, one of the parties finds it convenient to bring forward.

It is no defense that the government's policy has changed. It cannot so release itself from its engagement. The provision for the teaching of "sound literature and solid science" might be considered of "expansive character," to use the description of Lieber, and change with the progress of both. The provision for religious teaching is unchanging. It is as definite and absolute to-day as it was when it was written. The alternative of it the agreement has made the return of the property conveyed, or the payment of $15,000.

Judgment reversed and case remanded, with directions to proceed in conformity with this opinion.

Mr. Justice BREWER took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.